(23,119)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1911.

## No. 1043.

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WILLIAM S. LOVELL, TRUSTEE IN BANKRUPTCY OF KNIGHT, YANCEY & COMPANY, PLAINTIFF IN ERROR,

*vs.*

ISIDORE NEWMAN & SON ET AL.

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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INDEX.


| | Page |
|---|---|
| Caption | a |
| Transcript from the circuit court of the United States for the eastern district of Louisiana | 1 |
| Caption | 1 |
| Petition | 1½ |
| Citation | 7 |
| Marshal's return on citation | 8 |
| Exception and prayer for oyer | 9 |
| Motion and order fixing exceptions | 10 |
| Hearing and order maintaining exception of vagueness, with leave to plaintiff to amend petition | 11 |
| Supplemental and amended petition | 12 |
| Exception | 14 |
| Hearing on exception and submission | 15 |
| Opinion of court | 16 |
| Order overruling exceptions | 17 |
| Motion and order for delay to file answer | 18 |
| Answer of respondent | 18 |
| Schedule A, annexed to answer | 23 |


JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 16, 1912.

Page

Schedule B, annexed to answer ..... 25
Case called and fixed for trial ..... 25
Waiver of jury ..... 26
Case called, jury waived, hearing and submission ..... 27
Note as to Exhibits 1, 2, 3, 4, 5, 6, 7, and 8 and the translations thereof, marked Exhibits 1A, 2A, 3A, 4A, 5A, 6A, 7A, and 8A, offered by defendants ..... 28
Note as to pretended bills of lading, Exhibits 9 to 21, inclusive; drafts, being Exhibits 22 to 34, inclusive, and insurance certificates, being Exhibits 35 to 46, inclusive, offered by defendants ..... 28
Note as to invoices, Exhibits 47 to 58, inclusive, offered by defendants .. 28
Note as to genuine bills of lading, Exhibits 59 to 71, inclusive, offered by plaintiff ..... 29
Note as to stipulation, filed May 24, 1911 ..... 29
Note as to plaintiff's request to the court for special findings of fact .... 29
Joint petition of intervention of the Cotonificio Cantoni *et al* ..... 30
Answer of plaintiff to intervention of Cotonificio Cantoni *et al* ..... 33
Note of evidence ..... 34
Note as to stipulation as to value of certain lots of cotton referred to in the petition ..... 35
Note as to stipulation as to evidence on intervention ..... 36
Note as to request for findings of fact and conclusions of law submitted on behalf of the defendants and intervening petitioners ..... 36
Note as to findings of fact by the court ..... 37
Opinion ..... 37
Judgment ..... 41
Order allowing plaintiff 60 days to file bill of exceptions ..... 42
Order extending time for presenting bill of exceptions ..... 43
Bill of exceptions ..... 44
Waiver of jury ..... 45
Stipulation as to evidence ..... 46
Objections to evidence ..... 52
Exhibit 59—Bill of lading ..... 56
60—Bill of lading ..... 67
61—Bill of lading ..... 68
62—Bill of lading ..... 68
63—Bill of lading ..... 68
64—Bill of lading ..... 68
65—Bill of lading ..... 69
66—Bill of lading ..... 69
67—Bill of lading ..... 69
68—Bill of lading ..... 69
69—Bill of lading ..... 70
70—Bill of lading ..... 70
71—Bill of lading ..... 70
1—Original contract ..... 71
2—Original contract ..... 72
3—Original contract ..... 73
4—Original contract ..... 74
5—Original contract ..... 75
6—Original contract ..... 76
7—Original contract ..... 77
8—Original contract ..... 78

| | Page |
|---|---|
| Exhibit 1A—Translation of contract | 79 |
| 2A—Translation of contract | 80 |
| 3A—Translation of contract | 81 |
| 4A—Translation of contract | 82 |
| 5A—Translation of contract | 83 |
| 6A—Translation of contract | 84 |
| 7A—Translation of contract | 85 |
| 8A—Translation of contract | 86 |
| 9—Pretended bill of lading | 87 |
| 10—Pretended bill of lading | 98 |
| 11—Pretended bill of lading | 98 |
| 12—Pretended bill of lading | 99 |
| 13—Pretended bill of lading | 99 |
| 14—Pretended bill of lading | 99 |
| 15—Pretended bill of lading | 99 |
| 16—Pretended bill of lading | 100 |
| 17—Pretended bill of lading | 100 |
| 18—Pretended bill of lading | 100 |
| 19—Pretended bill of lading | 101 |
| 20—Pretended bill of lading | 101 |
| 21—Pretended bill of lading | 101 |
| Objections to evidence | 101 |
| Exhibit 22—Draft | 104 |
| 23—Draft | 105 |
| 24—Draft | 106 |
| 25—Draft | 106 |
| 26—Draft | 107 |
| 27—Draft | 108 |
| 28—Draft | 108 |
| 29—Draft | 109 |
| 30—Draft | 110 |
| 31—Draft | 110 |
| 32—Draft | 111 |
| 33—Draft | 112 |
| 34—Draft | 112 |
| 35—Certificate of insurance | 114 |
| Exhibits 36 to 46—Certificates of insurance | 116 |
| Exhibit 47—Invoice | 117 |
| 48—Invoice | 118 |
| 49—Invoice | 119 |
| 50—Invoice | 120 |
| 51—Invoice | 121 |
| 52—Invoice | 122 |
| 53—Invoice | 123 |
| 54—Invoice | 124 |
| 55—Invoice | 125 |
| 56—Invoice | 126 |
| 57—Invoice | 127 |
| 58—Invoice | 128 |
| Proceedings in United States district court | 129 |
| Petition | 129 |
| Order on petition | 132 |
| Subpœna in chancery | 133 |

| | Page |
|---|---|
| Restraining order | 134 |
| Exception | 135 |
| Answer | 136 |
| Answer of agent of steamship "Ingelfingen" | 142 |
| Decree | 144 |
| Injunction | 146 |
| Bond of receivers | 147 |
| Bond of master of steamship "Ingelfingen" | 149 |
| Supplemental stipulation as to value of cotton | 151 |
| Stipulation as to evidence on intervention | 152 |
| Plaintiff's request to the court for special findings of fact | 153 |
| Findings of fact requested by defendants | 161 |
| Conclusions of law submitted by defendants | 169 |
| Findings of fact by the court | 175 |
| Judge's certificate to bill of exceptions | 178 |
| Petition for writ of error | 178 |
| Order on petition for writ of error | 179 |
| Plaintiff's assignment of errors | 180 |
| Bond for writ of error | 193 |
| Stipulation as to record | 195 |
| Præcipe as to transcript | 196 |
| Order for transmission of documents in the originals | 198 |
| Motion and order fixing case for argument | 199 |
| Writ of error | 199 |
| Citation | 201 |
| Argument and submission | 202 |
| Opinion | 202 |
| Judgment | 212 |
| Petition for rehearing | 212 |
| Order denying rehearing | 214 |
| Petition for writ of error | 215 |
| Assignment of errors | 216 |
| Bond | 220 |
| Writ of error | 222 |
| Citation | 223 |
| Clerk's certificate | 223 |
| Stipulation as to original documents | 224 |

UNITED STATES OF AMERICA,
*Fifth Judicial Circuit:*

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, Begun on the Third Monday of November, 1911, at New Orleans, Louisiana, Before the Honorable Don A. Pardee, the Honorable A. P. McCormick, Circuit Judges, and the Honorable Thomas S. Maxey, District Judge.

No. 2296.

WILLIAM S. LOVELL, Trustee of Knight, Yancey & Company,
Plaintiff in Error,
versus
ISIDORE NEWMAN & SON et als., Defendants in Error.

Be it remembered, That heretofore, to-wit: on the 27th day of October, 1911, a transcript of the record of the above styled cause from the Circuit Court of the United States for the Eastern District of Louisiana was filed in the office of the Clerk of said United States Circuit Court of Appeals for the Fifth Circuit, in the words and figures following, to-wit:

UNITED STATES OF AMERICA, CIRCUIT COURT OF THE UNITED STATES, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION.

WILLIAM S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY,

Plaintiff in Error,

versus No. 13,839

ISIDORE NEWMAN & SON, ET ALS.,

Defendants in Error.

MESSRS. PERCY, BENNERS & BURR and DUFOUR & DUFOUR,

For William S. Lovell, Trustee of Knight, Yancey & Company, Plaintiff in Error;

MESSRS. WHEELER, CORTIS & HAIGHT and DART, KERNAN & DART,

For Isidore Newman & Son, J. K. Newman, E. A. Neugass, and Widow Isidore Newman (Defendants); The Cotonificio Cantoni; The Cotonificio Furter; The Manifattura Tosi; Gianoli Brothers; A. Bernocchi Brothers (Intervenors) : Defendants in Error.

WRIT OF ERROR to the United States Circuit Court for the Eastern District of Louisiana, New Orleans Division, returnable into the United States Circuit Court of Appeals for the Fifth Circuit, within Thirty (30) days from the Fourth (4th) day of October, A. D. 1911, at the City of New Orleans, State of Louisiana.

PETITION.

Filed July 21, 1910.

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY

versus No. 13,839

ISIDORE NEWMAN & SON, ET AL.

TO THE HONORABLE THE JUDGES OF THE UNITED STATES CIRCUIT COURT FOR THE FIFTH CIRCUIT AND EASTERN DISTRICT OF LOUISIANA:

The petition of William S. Lovell, a citizen of Birmingham, in the State of Alabama, with respect represents:

That your petitioners is the duly elected and qualified Trustee of Knight, Yancey, & Company, a partnership composed of John W. Knight, William J. Yancey, Robert H. Nesbitt and William D. Nesbitt, which said commercial firm had its principal place of business at Decatur, in the State of Alabama, and which said firm was duly adjudicated bankrupt by the District Court of the United States for the Northern District of Alabama, Northeastern Division, on the 20th day of April, 1910.

Your petitioner avers that he is a citizen of the State of Alabama and not a citizen of the State of Louisiana.

Your petitioner further avers that John W. Knight, one of the co-partners, was at the time of the adjudication in bankruptcy and is now a citizen of the State of Alabama; that William J. Yancey, another of said partners, was at the time of the adjudication in bankruptcy and is now a citizen of the

State of Tennessee; that Robert H. Nesbitt, another of said partners, was at the time of the adjudication in bankruptcy and is now a citizen of the State of South Carolina, and that William D. Nesbitt, another of said co-partners, was at the time of said adjudication in bankruptcy and is now a citizen of the State of Alabama; and that said aforementioned parties alone composed and constituted the firm of Knight, Yancey & Company.

Your petitioner further avers that the said partnership of Knight, Yancey & Company, had its principal place of business at Decatur in the State of Alabama.

Your petitioner further represents that Isidore Newman & Son, a commercial firm domiciled and doing business in the City of New Orleans, and the individual members thereof, J. K. Newman, E. A. Neugass and widow Isidore Newman, all being citizens of the State of Louisiana and residing in the City of New Orleans, in the Eastern District of Louisiana, and within the jurisdiction of this Court, are justly and truly indebted unto your petitioner in the full sum of Ninety-eight Thousand Five Hundred ($98,500) Dollars with legal interest from judicial demand, for this, to-wit:

That as averred, your petitioner is the trustee in bankruptcy of Knight, Yancey & Company, duly elected on the 26th, day of March, 1910, and that he has duly qualified as such.

That on the 3rd day of May, 1910, C. E. Frost and W. S. Lovell, the then receivers in bankruptcy of Knight, Yancey, bankrupt, filed in the United States District Court for the Eastern District of Louisiana a petition showing among other things that the said C. E. Frost and W. S. Lovell were Receivers in bankruptcy of the said bankrupt; that there were certain bales of cotton, the property of the bankrupt Estate, at the port of Chalmette and at the port of New Orleans which said cotton was about to be removed to foreign ports and beyond the jurisdiction of this Court or of the United States District Court for the Eastern District of Louisiana, and that as a result of said removal the said asset of the bankrupt estate would become wholly lost to the said bankrupt Estate and

the said Receivers prayed that an injunction pendente lite issue by said Court prohibiting the removal of said cotton from the jurisdiction as aforesaid, all of which will appear more fully from said petition which is made part hereof as though fully and at length set forth herein.

That, in accordance with the prayer of said petition, the Honorable Judge of the United States District Court for the Eastern District of Louisiana did on the 3rd day of May, 1910, issue a restraining order prohibiting the removal of the cotton aforesaid until the further orders of the Court all of which will appear more fully from said restraining order which is made part hereof as though fully and at length set forth herein. That on May 6th, 1910, one Th. Ruhne filed his answer to the petition aforesaid, averring among other things that he was the Master of the Steamship "Ingelfingen," and that thirteen hundred and eleven (1311) bales of cotton mentioned in the said petition had been loaded on the said Steamship and was in his possession as Master of said vessel, which said cotton was and is marked and described as follows:

100 TSAG
100 PSEX
100 TSST
100 TSXS
100 QSMP
100 QNET
100 TSSL
100 PSSI
100 TSCZ (PSCZ)
100 TSI
100 TSC
100 TSPG
100 SDON

And the said Th. Ruhne prayed the right as Master of said Steamship to remove the said cotton to its alleged destination, to-wit: Genoa, Italy, and prayed for such authority, all of which will appear more fully from the pleadings filed by the said Th. Ruhne, Master of the Steamship "INGELFIN-

GEN," which are made part hereof as though fully and at length set forth herein.

That, thereafter, to-wit: on May 6th, 1910, upon the hearing of said petition and on motion to set aside the restraining order aforesaid, the said United States District Court for the Eastern District of Louisiana declined to grant the said motion, and upon the filing of answer by the said Th. Ruhne, the said United States District Court for the Eastern District of Louisiana did order and direct an injunction pendente lite to issue against the Master of the Steamship "Ingelfingen" and the agents of said Steamship, enjoining, restraining and prohibiting them or either of them from removing out of and from the jurisdiction of said Court the 1311 bales of cotton hereinbefore referred to and admitted by the said Ruhne to be in his possession, upon the Receivers furnishing bond in the sum of ten thousand ($10,000) Dollars.

Your petitioner further represents that, in accordance with said order, the said Receivers furnished bond as required, which was approved by the Court, and thereupon the injunction pendente lite issued in the manner and form prescribed by law and as hereinbefore set forth.

That by the terms of the aforesaid decree, it was further provided that the Master of said Steamship, and the agents thereof, might remove said cotton from the jurisdiction of said Court, provided they, or either of them, should pay into the Registry of the Court the value of said cotton or furnish bond, with surety acceptable to the Court, and subject among others to the hereinafter mentioned conditions, for the then cash value of the cotton referred to and described in said pleadings, which said cash value was fixed at Ninety-eight Thousand Five Hundred ($98,500) Dollars.

Your petitioner further represents that the said order provided more specifically as follows: "Said bond shall be conditioned upon the payment of the principal sum thereof, or such part thereof as the Court may direct, by the surety thereon to the Receivers of Knight, Yancey & Company, in bankruptcy, or to such Trustee as may hereinafter be elected or appointed, if, in a suit or action at law or equity that may

or shall hereafter be brought in the Circuit or District Court of the United States for the Eastern District of Louisiana by the Receivers in Bankruptcy of Knight, Yancey & Company, or the Trustee or Trustees in Bankruptcy of said Knight, Yancey & Company, against the surety on said bond, it shall be adjudged that the said Receivers or said Trustee or Trustees of said Knight, Yancey & Company, or the bankrupt estate of Knight, Yancey & Company, have the right, title or interest to said cotton or any part thereof;" all of which will appear more fully by said decree which is made a part hereof as though fully and at length set forth herein.

Your petitioner further represents that on May 11, 1910, availing himself of the rights granted unto the aforesaid order, the said Th. Ruhne did file in the said proceedings his bond in the sum of Ninety-eight Thousand Five Hundred ($98,500) Dollars, with Isidore Newman & Son as surety, the said Isidore Newman & Son being a commercial firm domiciled and doing business in the City of New Orleans, composed of Jacob K. Newman, E. A. Neugass, and Mrs. Isidore Newman, all citizens of the State of Louisiana and residents of the Eastern District of Louisiana.

Your petitioner avers that the said bond was conditioned as follows:

> "That if said Th. Ruhne and Isidore Newman and Son, New Orleans, La., above mentioned, shall well and truly pay to the said obligees the said sum of Ninety-eight Thousand Five Hundred ($98,500) Dollars, or such part thereof as the Court may direct, if, in a suit or action at law or in equity, that may or shall hereafter be brought on this bond by said Receivers, or by said Trustee or Trustees or by said estate in bankruptcy against the obligors herein or either of them, in the Circuit or District Courts of the United States for the Eastern District of Louisiana, it shall be adjudged that said Receivers, or said Trustee or Trustees, of said Knight, Yancey & Company have the right, title and interest in or to said cotton, or any part thereof, then and in such case this obligation shall

be null, void and of no effect, otherwise the same shall remain in full force and effect."
all of which will appear more fully by a copy of said bond which is hereto annexed and made part hereof.

Your petitioner further avers that all the pleadings and the bond above referred to were filed and that all decrees and orders were rendered and made in the proceedings entitled "C. E. Frost and W. S. Lovell, Receivers, et als, vs the Master of the Steamship Ingelfingen, et als," No. 14,125 United States District Court, Eastern District of Louisiana.

Your petitioner further avers that the said 1311 bales of cotton were at the time of the bankruptcy proceedings and have ever since been the property of Knight, Yancey & Company, and that as Trustee in bankruptcy of the said Knight. Yancey & Company, your petitioner as aforesaid is the owner of and has the right, title and interest in and to the said 1311 bales of cotton, and that your petitioner is therefore entitled to proceed against and to demand, collect and receive the principal sum of the bond filed by the said Th. Ruhne with the said Isidore Newman & Son as surety, by the furnishing of which said bond the said Th. Ruhne, Master of the Steamship "Ingelfingen," was permitted to maintain and did maintain and has ever since maintained an illegal possession of said property and was permitted to remove and did remove same from the jurisdiction of said Court, and has unlawfully converted or caused to be converted said cotton and its proceeds to his own use, or to the use of the owner and agents of said Steamship, or for the use of certain alleged owners and claimants of said cotton.

WHEREFORE, petitioner prays that the said Isidore Newman & Son be cited to answer this petition and that after due proceedings had, there be judgment in favor of your petitioner William S. Lovell, Trustee of Knight, Yancey and Company, and against the firm of Isidore Newman and Son and the individual members thereof Jacob K. Newman, E. A. Neugass and Mrs. Isidore Newman, in solido, in the sum of

Ninety-eight Thousand Five Hundred ($98,500) Dollars with legal from judicial demand.

Petitioner prays for costs and for general relief.

(Signed) SAUNDERS, DUFOUR & DUFOUR,
Attorneys.

July, 1910
(signed) PERCY, BENNERS & BURR,
Of Counsel.

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CITATION ISSUED TO ISIDORE NEWMAN & SON,
July 25th, 1910.

United States of America, Eastern District of Louisiana.

Circuit Court of the United States Fifth Circuit and Eastern District of Louisiana, New Orleans Division.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY

vs. No. 13,839.

ISIDORE NEWMAN & SON ET ALS.

THE PRESIDENT OF THE UNITED STATES OF AMERICA, GREETING:

To Isidore Newman & Son, a commercial firm domiciled and doing business in the City of New Orleans.

YOU ARE HEREBY SUMMONED to comply with the demand contained in the petition of which a copy accompanies this Citation, or to deliver your answer to the same in the office of the Clerk of the Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, in the City of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of resi-

dence is distant from New Orleans, the place where the Court is held.

WITNESS, the Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 25th day of July, A. D. one thousand nine hundred and ten, and independence of the United States of America the 135th year.

(Seal)

Teste:

(Signed) H. J. CARTER,
Clerk.

By.....
Deputy Clerk.

CLERK'S OFFICE:-
A true copy of the original.
New Orleans, La., July 25th., 1910.

(SEAL) (Signed) H. J. Carter,
Clerk.

MARSHAL'S RETURN ON CITATION,
Filed July 27, 1910.

RECEIVED BY
U. S. MARSHAL,
NEW ORLEANS, LA.
JULY 25TH., 1910.

And on the 27th day of the same month and year I served the original of which this writ is a certified copy, together with a certified copy of the plaintiff's accompanying petition on Isidore Newman and Son by handing the same to Mr. E. A. Neugass a member of said firm, in person in the office of said Isidore Newman and Son, in the City of New Orleans, La.

VICTOR LOISEL,
U. S. Marshal.

(Signed) By T. I. GALBRETH,
Deputy U. S. Marshal.

## EXCEPTION AND PRAYER FOR OYER

Filed January 24, 1911.

United States Circuit Court, Eastern District of Louisiana.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY.

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

Now comes Isidore Newman & Son, and for exception to plaintiff's petition says that the same is vague and indefinite, and exceptor is entitled to further and more precise information regarding the history and origin of the title set up by the plaintiff herein, and exceptor further is entitled to oyer of the deeds, bills, instruments or other papers held as muniments of title;

WHEREFORE, exceptor prays that this exception may be maintained and that plaintiff be required to amend in the particulars hereinabove referred to, within the delays to be fixed by the Court, under penalty of dismissal for failure so to do, and in any event that exceptor have oyer of the instruments or other evidence of title relied upon by the plaintiff and be ordered to produce and file the same within the delay to be fixed by the Court, and exceptor prays for such other and further orders as the case requires and for all general and equitable relief.

(Signed) DART, KERNAN & DART,
Attorneys.

## MOTION AND ORDER FIXING EXCEPTIONS.

Extract from the Minutes,

November Term, 1910.

New Orleans, Wednesday, February 15, 1911.

Court met pursuant to adjournment.

Present: Hon. Rufus E. Foster, District Judge.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY.

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

On motion of Isidore Newman & Son, defendants herein, and Dart, Kernan & Dart, Attys., and upon suggesting to the Court that the exception heretofore filed herein by movers should be fixed for trial;

It is ordered that the exception heretofore filed by movers herein be fixed for trial on Saturday, the 18th day of February, 1911, at 11 o'clock A. M., and notice thereof be given herein in the manner pointed out by law.

## HEARING AND ORDER MAINTAINING EXCEPTION OF VAGUENESS WITH LEAVE TO PLAINTIFF TO AMEND PETITION.

Extract from the Minutes,

November Term, 1910.

New Orleans, Saturday, February 18, 1911.

Court met pursuant to adjournment.

Present: Hon. Rufus E. Foster, District Judge.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY.

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

This cause came on this day to be heard upon the Exceptions herein filed by the Defendants to the Petition herein;

Present: Dart, Kernan & Dart, Attorneys for Exceptors,
" Dufour & Dufour, of Counsel for Plaintiff in suit;

And was argued by Counsel for the respective parties.

Whereupon, and on due consideration thereof, it is ordered by the Court that the Exception of Vagueness herein be maintained, with leave to the Plaintiff to amend his Petition.

## SUPPLEMENTAL AND AMENDED PETITION.

Filed March 10, 1911.

United States Circuit Court, Eastern District of Louisiana.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY.

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

The supplemental and amended petition of William S. Lovell, Trustee of Knight, Yancey & Company, Bankrupt, with respect represents:

That your petitioner does now reiterate each and every allegation of the original petition herein filed, except and to the extent that said allegations, or any one of them, may be changed or modified herein.

Petitioner avers that in the original petition herein filed, he has referred to and made part of his said original petition the petition filed by C. E. Frost and W. S. Lovell, as Receivers in bankruptcy of Knight, Yancey & Company, Bankrupt, in the suit entitled "C. E. Frost and W. S. Lovell, Receivers in Bankruptcy of Knight, Yancey & Company, Bankrupt, vs. Master and Owners of the S. S. "Ingelfingen;" No. 14,129 of the docket of the United States District Court for the Eastern District of Louisiana.

Your petitioner further avers that in said petition, in said suit No. 14,129 aforesaid, it was averred, among other things, that the original bills of lading for the cotton therein involved had either been destroyed or made away with, and were not then outstanding or in the bona fide possession of any third person, and your petitioner avers that at the time said allegations were made, and at the time said suit was filed, the Receivers in Bankruptcy of Knight, Yancey & Company, Bankrupt, were of the opinion that the bills of lading for said cotton were not in their possession or under their control or in the possession or under the control of any other person or

sons whatever; but that, notwithstanding said facts, the said Receivers, as petitioners in said suit, claimed the title, as owners, to all of the said cotton to be in them as such Receivers and in the bankrupt estate of Knight, Yancey & Company, Bankrupt.

Your petitioner further avers that the statements in said petition contained with reference to said bills of lading are not true in point of fact, and that the bills of lading for all of said cotton described in the original petition herein, and in the petition in said suit No. 14,129, were in the possession and under the control of the Receivers of Knight, Yancey & Company, Bankrupt, and have since come into the possession and are now under the control of your petitioner as Trustee of Knight, Yancey & Company, Bankrupt, and your petitioner reiterates that the title to all of the cotton described in said original petition was in said Knight, Yancey & Company, Bankrupt, and is in said bankrupt estate and in your petitioner as the Trustee in Bankruptcy of Knight, Yancey & Company, Bankrupt.

WHEREFORE, petitioner prays that he have leave to file this supplemental and amended petition; that the said Isidore Newman & Son, and the individual members thereof, to-wit: Mrs. Isidore Newman, Jacob K. Newman and E. A. Neugass, be cited to appear and answer hereto, and that, after due proceedings had, there be judgment in favor of your petitioner and against the said Isidore Newman & Son and the individual members thereof, in solido to wit: Mrs. Isidore Newman, Jacob K. Newman and E. A. Neugass, in the full sum of $98,500.00, with legal interest from the date of the original judicial demand herein;

And petitioner prays for all costs and for all general and equitable relief.

(Signed) DUFOUR & DUFOUR,
Attys. for Petitioner.

Service accepted,

(Signed) Dart, Kernan & Dart, Attys. for I. Newman & Son.
March 10th, 1911.

ORDER:

It is ordered that this supplemental and amended petition be filed and served according to law.

(Signed) Rufus E. Foster,
Judge.

New Orleans, March 10th., 1911.

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EXCEPTION.

Filed March 10, 1911.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY.

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

Now comes Isidore Newman & Son defendants herein and for exception to the original and supplemental petns say that the same presents an issue which cannot be tried on the law side and therefore the said petitions set forth no cause of action at law against this exceptor and this Court is without jurisdiction in the premises.

Wherefore exceptor prays these exceptions may be maintained and the suit dismissed.

And for such other and further orders and relief as the case requires.

(Signed) Dart, Kernan & Dart,
Attorneys.

Before me the undersigned authority personally came and appeared Henry P. Dart who being sworn says he is one of the Counsel for deft and exceptor in the foregoing pleading.

That in the affiant's opinion the foregoing exception is well founded to the best of his opinion and belief.

Sworn to and subscribed before
me this 10th day of March 1911. (Signed) Henry P. Dart

(Signed) H. J. Carter
U. S. Commissioner.

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## HEARING ON EXCEPTIONS AND SUBMISSION.

Extract from the Minutes,

November Term, 1910.

New Orleans, Friday, March 10, 1911.

Court met pursuant to adjournment.

Present: Hon. Rufus E. Foster, District Judge.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY.

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

This cause came on this day to be heard upon the Exceptions of no cause of action and to the jurisdiction of the Court, this day filed by the Defendants herein;

Present: Dart, Kernan & Dart, Attorneys for Exceptors.

Dufour & Dufour, Attorneys for Plaintiff in suit;

Whereupon, the parties having filed a written stipulation in this cause waiving trial by jury on said Exceptions, the cause was taken up before the Court, and after hearing the arguments of Counsel for the respective parties, the matter was submitted—when the Court took time to consider.

## OPINION OF COURT.

Filed March 18, 1911.

United States Circuit Court, Eastern District of Louisiana.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY.

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

As this case stood on the original petition, in view of some of the allegations of the petition in the district court referred to, there might have been some doubts as to plaintiff's right to proceed at law but, considering the supplemental petition whereby the plaintiff has eliminated those pleadings from the instant case and stands solely on his claim of absolute ownership of the cotton, it is clear the action is properly at law. If anything were needed to strengthen this, the statement of plaintiff's counsel in open court that he disavows any intention of claiming a voidable preference against anyone, in regard to the shipment of the cotton, is sufficient.

In conformity to the decree, the bond stipulates that a suit may be brought by the trustee of Knight, Yancey & Company solely against the surety on the bond. The bond is probably sui generis but an action on it is analogous to other common law actions on bonds in the nature of forthcoming and replevin bonds, and, in that view of the case, all defenses, even those not personal, are open to the surety. I can conceive of nothing that could be set up and determined in equity that cannot as well be set up and determined in this cause. Such being the case, the jurisdiction at law must be favored and the exception overruled.

## ORDER OVERRULING EXCEPTIONS.

Extracts from the Minutes,

November Term 1910.

New Orleans, Saturday, March 18, 1911.

Court met pursuant to adjournment.

Present: Hon. Rufus E. Foster, District Judge.

**W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY.**

**vs.** **No. 13,839**

**ISIDORE NEWMAN & SON, ET AL.**

This cause came on at a former day to be heard upon the Exceptions of no cause of action and to the jurisdiction of the Court, filed herein by the Defendants on March 10th 1911, and the parties having filed a written stipulation waiving trial by jury on the said Exceptions, the cause was taken up before the Court on the said Exceptions, and after hearing arguments of Counsel for the respective parties, the matter was submitted.

Whereupon, the Court having duly considered the same, and for the written reasons on file, it is ordered that the said Exceptions of no cause of action and to the jurisdiction of the Court herein filed by the Defendants on March 10th, 1911. be, and the same are hereby overruled.

## MOTION AND ORDER FOR DELAY TO FILE ANSWER.

Extract from the Minutes,
November Term, 1910.

New Orleans, Tuesday, March 21, 1911.
Court met pursuant to adjournment.
Present: Hon. Rufus E. Foster, District Judge.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY.

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

On motion of Dart, Kernan & Dart, of Counsel for Defendants herein;

It is ordered by the Court that a delay of ten days be allowed the Defendants in which to file their answer.

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## ANSWER OF RESPONDENT.

Filed April 6th., 1911.

United States Circuit Court, Eastern District of Louisiana.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY.

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

Now into Court comes ISIDORE NEWMAN & SON, a commercial firm domiciled and doing business in the City of New Orleans, who, reserving the benefit of the exception herein filed, to the supplemental petition and which exception has been overruled by the Court, for answer to the plaintiff's original and supplemental petition denies, all and singular, the facts and allegations therein contained save insofar as may be hereinafter admitted;

For further answer, respondent admits that the said firm of Isidore Newman & Son is composed of the persons named in the petition, that said firm executed the bond on which this action is instituted and with the authority of all the members thereof;

For further answer, respondent denies that the plaintiff had at the time of the execution of said bond any right, title or interest in or to said cotton, and specially denies that he has now, any right, title or interest in same, or in, to or upon the bond sued upon herein;

Respondent further represents that the cotton herein involved, namely, Thirteen Hundred and Eleven (1311) bales bearing the marks and numbers set out in the Schedules A. & B. annexed hereto as part of this answer, was before the institution of said injunction proceedings and at the time of the institution of same and at the date of the execution of said bond the property of the following persons, to-wit:

The Cotonificio Cantoni, the Cotonificio Furter and the Manifattura Tosi, corporations organized and existing under the laws of the Kingdom of Italy and engaged in the business of cotton spinners, the first and second at Milan, Italy, and the last at Busto Arsizio, Italy; Gianoli Brothers, a co-partnership, composed of Guido Gianoli, Rinaldo Gianoli, Giovanni Gianoli and Carina Dupre Gianoli, doing business as cotton spinners at Vigevano, Italy: A. Bernocchi Brothers, a co-partnership, composed of Antonio Bernocchi, Alessandro Bernocchi, Michael Bernocchi, and Andrea Bernocchi, doing business as cotton spinners at Legnano, Italy;

Respondent further represents that said cotton was acquired by said persons as follows, to-wit:

On or about December 15, 1909, said Cotonificio Cantoni duly contracted with Knight, Yancey & Company to purchase from said Knight, Yancey & Company, at an agreed price, 900 bales of cotton to be shipped by Knight, Yancey & Company via rail and ocean carriers from the point of shipment in Alabama under through bill of lading for Genoa, Italy;

On or about January 13, 1910, the said Cotonificio Cantoni duly contracted with Knight, Yancey & Company to purchase from said Knight, Yancey & Company, at an agreed price, 100 additional bales of cotton to be shipped as aforesaid.

On or about January 12, 1910, the Cotonificio Furter duly contracted with Knight, Yancey & Company to purchase from said Knight, Yancey & Company, at an agreed price, 500 bales of cotton, to be shipped by said Knight, Yancey & Company as aforesaid to said purchaser at Genoa, Italy;

On or about January 29, 1910, said Manifattura Tosi duly contracted with Knight, Yancey & Company to purchase from said Knight, Yancey & Company, at an agreed price, 600 bales of cotton, to be shipped as aforesaid to said purchaser by Knight, Yancey & Company at Genoa, Italy;

On or about January 15, 1910, said Manifattura Tosi duly contracted with Knight, Yancey & Company to purchase from said Knight, Yancey & Company, at an agreed price, 500 other bales of cotton, to be shipped as aforesaid to said purchaser.

On or about January 15, 1910, said Gianoli Brothers duly contracted with Knight, Yancey & Company to purchase from said Knight, Yancey & Company, at an agreed price, 200 bales of cotton, to be shipped by said Knight, Yancey & Company as aforesaid to said purchasers at Genoa, Italy;

On or about January 29, 1910, said Bernocchi Brothers duly contracted with Knight, Yancey & Company to purchase from Knight, Yancey & Company 200 bales of cotton, at an agreed price, to be shipped as aforesaid by said Knight, Yancey & Company to said purchasers at Genoa, Italy.

Respondent further represents that thereafter, and in pursuance of said contracts of purchase, the firm of Knight, Yancey & Company at or about the dates indicated in schedule A, hereto annexed, issued through bills of lading for 1400 bales of the cotton called for by said contracts, said bills of lading stating said cotton to be marked as indicated in said Schedule A. Said bills of lading were signed, or purported to be signed, by the agent of the Southern Railway at the respective points of shipment indicated in Schedule A, and routed said cotton via the Southern Railway from the point of shipment to New Orleans, and thence by steamship to Genoa, Italy. Said bills of lading consigned the cotton purporting to be covered by them to the shippers' order, Knight, Yancey & Company thereupon attached to said bills of lading drafts on the respective purchasers for the agreed price of each lot of cotton in the

amounts indicated in said Schedule A, together with invoices and certificates of insurance, endorsed said bills of lading and certificates in blank, and thereupon discounted said drafts with the respective bills of lading attached, through various bankers, by whom said drafts, with the bills of lading attached, were forwarded to the several purchasers for acceptance by them. Said drafts were accepted, and the bills of lading and other documents thereto attached were received on or about the dates indicated in said Schedule A by the various banks therein indicated, on behalf of the several purchasers respectively, whose agents said banks were. Said drafts were duly paid by said purchasers as they matured. The proceeds arising from the discount of said drafts were received and retained by said Knight, Yancey & Company, and by the petitioner herein.

Respondent further represents that at the time said drafts with bills of lading attached were discounted by Knight, Yancey & Company and forwarded for acceptance, as aforesaid no cotton had in fact been shipped by said Knight, Yancey & Company, and said bills of lading were in fact false, misleading and fraudulent insofar as they represented that such cotton had been shipped, but respondent represents that this fact was not known to said purchasers, and said drafts, and each of them were accepted with the bills of lading and other documents thereto attached, by the several purchasers, or their agents aforesaid, in good faith, on account of the contracts of purchase aforesaid, and in reliance upon the representations contained in the said bills of lading and other documents that the cotton called for therein had in fact been shipped, and without any knowledge or notice of any fact indicating that said cotton had not been actually shipped.

Respondent further represents that thereafter, and on or about the dates indicated in Schedule B, hereto annexed said Knight, Yancey & Company actually shipped 1400 bales of the cotton called for by said contracts respectively, marked in precise accordance with the fraudulent bills of lading already referred to, from the points of shipment indicated in Schedule B, hereto attached, under bills of lading obtained from the Southern Railway which were duplicates, or substantially duplicates, of the fraudulent bills of lading already re-

ferred to. That said last mentioned bills of lading were suppressed by said Knight, Yancey & Company, who made no use whatever of the same. That said cotton was so shipped by Knight, Yancey & Company for the purpose of filling the contracts of purchase made as aforesaid, and with the intent thereby to appropriate said cotton to the fulfillment of said contracts, and to pass the title thereto to the several purchasers, and by reason of the premises title to said cotton passed to the various purchasers thereof; and the firm of Knight, Yancey & Company and the plaintiff as successor to its rights are estopped from asserting title in themselves to said cotton or any part thereof.

Respondent further represents that of the cotton so shipped by Knight, Yancey & Company 89 bales marked TSLL went forward to Genoa by the SS. Sicania. The balance, indicated by Schedule B, is the 1311 bales referred to in the petition, and same was carried by said Railway, delivered at the port of New Orleans to said SS. Ingelfingen, and was actually loaded on board the SS. Ingelfingen for account of said purchasers, and before the suit was instituted under which the bond now in suit was given by respondent. That the possession of said cotton by the Master of said ship was actual and legal and he was entitled to retain same.

Respondent denies that the said 1311 bales of cotton, or any of them, were at the time of the bankruptcy proceedings, or have at any time since, been the property of Knight, Yancey & Company, and further deny that the plaintiff has or ever has had, any right, title or interest in or to the said 1311 bales of cotton, or any of them, and denies that the plaintiff is entitled to proceed upon the bond filed by said Th. Ruhne.

WHEREFORE, respondent prays that there may be judgment in favor of respondent, and against the plaintiff, denying and rejecting the demand herein instituted and releasing respondent from further action and liability upon said bond.

And for such other and further orders and general relief as it may be entitled to, and for costs, and respondent will ever pray.

(Signed) Wheeler, Cortis & Haight,
Dart, Kernan & Dart,
Attorneys.

SCHEDULE A.

| Purchaser | Date of B/L 1910 | No. of bales and Marks | Point of Shipment | Amount of Draft | Date of Acceptance 1910 | Bank Accepting |
|---|---|---|---|---|---|---|
| Catonificio Cantoni | Feb. 1 | 150-QSMP | Decatur | 2309- 6-11 | Feb. 14 | Swiss Bank, Verein, London |
| Catonificio Cantoni | Feb. 1 | 150-PSSI | Decatur | 2290-19-11 | Feb. 14 | Swiss Bank, Verein, London |
| Catonificio Cantoni | Jan. 20 | 100-TSAG | Decatur | 1411- 2- 2 | Feb. 1 | Fred'k Hutti & Co., London |
| Catonificio Cantoni | Jan. 31 | 100-QNET | Decatur | 1525-10- 0 | Feb. 16 | Credit Italiano, Milan |
| Catonificio Furter | Feb. 1 | 100-TSCZ | Selma | 1445- 8- 0 | Feb. 15 | Banca Commerciale, Milan |
| Catonificio Furter | Feb. 1 | 100-TSPG | Selma | 1451- 3- 9 | Feb. 15 | Banca Commerciale, Milan |
| Catonificio Furter | Feb. 1 | 100-TSIC | Selma | 1448-10- 5 | Feb. 15 | Banca Commerciale, Milan |

## SCHEDULE A (Continued)

| Purchaser | Date of B/L 1910 | No. of bales and Marks | Point of Shipment | Amount of Draft | Date of Acceptance 1910 | Bank Accepting |
|---|---|---|---|---|---|---|
| Manifattura Tosi | Feb. 7 | 100-SDON | Selma | 1547- 5- 0 | Feb. 24 | Banca Commerciale, Milan |
| Manifattura Tosi | Feb. 7 | 100-TSCI | Selma | 1544- 5- 3 | Feb. 24 | Banca Commerciale, Milan |
| Manifattura Tosi | Jan. 18 | 100-TSLL | Decatur | 1459- 3- 7 | Feb. 3 | Banca Commerciale, Milan |
| A Bernocchi Bros. | Feb. 7 | 100-PSEX | Decatur | 1573-16- 9 | Feb. 19 | Banca Commerciale, Milan |
| Gianoli Bros. | Jan. 21 | 100-TSXS | Decatur | 1458- 5- 9 | Feb. 3 | Banca Commerciale, Milan |
| Gianoli Bros. | Jan. 24 | 100-TSST | Decatur | 1454- 2- 9 | Feb. 7 | Same |

both payable in London.

SCHEDULE B.

| No. of Bales and marks | Points of Shipment | Dates |
|---|---|---|
| 150 bales QSMP | Decatur, Ala. | April 6, 1910 |
| 150 " PSSI | Decatur, Ala, | April 7, 1910 |
| 100 " TSAG | Decatur, Ala. | April 11, 1910 |
| 100 " QNET | Decatur, Ala | April 1 1910 |
| 100 " TSCZ (PSCZ) | Selma, Ala. | April 7, 1910 |
| 100 " TSPG | Selma, Ala. | April 7, 1910 |
| 100 " TSIC | Selma, Ala. | April 7, 1910 |
| 100 " SDON | Selma, Ala. | April 7, 1910 |
| 100 " TSCI | Selma, Ala. | April 7, 1910 |
| 100 " TSLL (x) | Decatur, Ala. | March 16, 1910 |
| 100 " TSXS | Decatur, Ala. | April 6, 1910 |
| 100 " TSST | Decatur, Ala. | April 7, 1910 |
| 100 " PSEX | Decatur, Ala. | April 11, 1910 |

(x) 89 bales per SS Sicania
11 bales per SS Ingelfingen.

CASE CALLED AND FIXED FOR TRIAL.

Extract from the Minutes of Monday,

April 24, 1911.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

This cause was this day called.

Whereupon, on motion of Counsel for Plaintiff, it was ordered that said cause be fixed for trial on May 24th, 1911, at 11 o'clock, A. M., and that Counsel for Defendants be notified thereof.

## WAIVER OF JURY

Filed May 24th, 1911.

United States Circuit Court, Eastern District of Louisiana.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

### STIPULATION.

PURSUANT to section 649 of the Revised Statutes of the United States, it is stipulated and agreed by and between the parties hereto, through their respective attorneys, that a jury be, and hereby is, waived and that the issues in this cause be tried by the Court without the intervention of a jury.

NEW ORLEANS, May 24, 1911.

(Signed) DUFOUR & DUFOUR,
PERCY, BENNERS & BURR,
Attorneys for Plaintiff,

(Signed) DART, KERNAN & DART,
WHEELER, CORTISS & HAIGHT,
Attorneys for Defendants.

## CASE CALLED, JURY WAIVED, HEARING AND SUBMISSION.

Extract from the Minutes,

April Term, 1911.

New Orleans, Wednesday, May 24, 1911.

Court met pursuant to adjournment.

Present: Hon. Rufus E. Foster, District Judge.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

This cause was this day called for trial.

Present: Dufour & Dufour and Percy, Benners & Burr, Attorneys for Plaintiff,

" Dart, Kernan & Dart and Wheeler, Cortis & Haight, J. W. Griffin, Attorneys for Defendants.

Whereupon the parties having filed a written stipulation in this cause waiving trial by jury, the cause was taken up before the Court.

Thereupon Counsel for Plaintiff offered evidence in his behalf and Counsel for Defendants offered evidence in their behalf, and the cause was argued by the Counsel for the respective parties, and the Court took the cause under consideration.

United States Circuit Court, Eastern District of Louisiana.
New Orleans Division.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

Exhibits 1, 2, 3, 4, 5, 6, 7,and 8, and the Translations thereof, marked

Exhibits 1A, 2A, 3A, 4A, 5A, 6A, 7A, and 8A, Offered by Defendants and filed May 24th, 1911.

NOTE:-

Copied into the Bill of Exceptions from page 71 to page 86 of this Transcript.

* * * * * * * * *

Pretended Bills of Lading, being Exhibits numbered 9 to 21, both inclusive;

Drafts, being Exhibits numbered 22 to 34, both inclusive;

Insurance Certificates, being Exhibits 35 to 46, both inclusive; Offered by Defendants and filed May 24th, 1911.

NOTE:-

To be transmitted in the originals to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, with this transcript, in accordance with Stipulation of Counsel, copied at page 195 of this transcript.

* * * * * * * * *

Invoices, being Exhibits numbered 47 to 58, both inclusive; Offered by Defendants and filed May 24th, 1911.

NOTE:-

Copied into the Bill of Exceptions from Page 117 to page 128 of this Transcript.

* * * * * * * * *

Genuine Bills of Lading, being Exhibits numbered 59 to 71, inclusive; Offered by Plaintiff and filed May 24th, 1911.

NOTE:-

To be transmitted in the originals to the Honorable United States Circuit Court of Appeals for the Fifth Circuit, with this transcript, in accordance with Stipulation of Counsel, copied at page 195 of this transcript.

United States Circuit Court, Eastern District of Louisiana.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

STIPULATION Filed May 24th, 1911.

NOTE:-

Copied into the Bill of Exceptions at page 46 et stq., of the transcript.

United States Circuit Court, Eastern District of Louisiana.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

PLAINTIFF'S REQUEST TO THE COURT FOR SPECIAL FINDINGS OF FACT,

FILED AS OF DATE MAY 24TH, 1911.

Note:-

Copied into the Bill of Exceptions at page 153 et seq., of the transcript.

JOINT PETITION OF INTERVENTION OF THE COTONIFICIO CANTONI, ET ALS.,

Filed May 31, 1911.

United States Circuit Court, Eastern District of Louisiana.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

TO THE HONORABLE THE JUDGE OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE FIFTH CIRCUIT, EASTERN DISTRICT OF LOUISIANA:

The joint petition of intervention of:

(1) The Cotonificio Cantoni, a corporation organized and existing under the laws of the Kingdom of Italy and engaged in the business of cotton spinners at Milan, Italy;

(2) The Cotonificio Furter, a corporation organized and existing under the laws of the Kingdom of Italy and engaged in the business of cotton spinners at Milan, Italy;

(3) The Manifattura Tosi, a corporation organized and existing under the laws of the Kingdom of Italy and engaged in the business of cotton spinners at Busto Arsizio, Italy;

(4) Gianoli Brothers, a co-partnership, composed of Guido Gianoli, Rinaldo Gianoli, Giovanni Gianoli and Carina Dupre Gianoli, doing business as cotton spinners, at Vigevano, Italy; and

(5) A. Bernocchi Brothers, a co-partnership, composed of Antonio Bernocchi, Alessandro Bernocchi, Michael Bernocchi and Andrea Bernocchi, doing business as cotton spinners, at Legnano, Italy,

Respectfully shows:

That petitioners are the persons named in the answer filed herein by Isidore Newman & Son and are the persons named

in the stipulation agreed upon between the plaintiff and defendant herein, and each and all of them are citizens of Italy.

That petitioners were, at and before and at all times since the date of the filing of the petition in bankruptcy by Knight, Yancey & Company and at the time of the issuance of the original injunction herein, in the District Court, and at the time of the giving of the bond herein sued upon, the Owners of the cotton involved in the litigation in question, having acquired the same in the manner set out in the answer herein filed by the defendant Isidore Newman & Son.

That petitioners have an interest in defeating the claims and pretenses of the plaintiff herein and in maintaining and supporting the answer and defense of the defendant herein; that petitioners therefore desire to be permitted to intervene herein for the purpose of joining the defendant in its said defense.

Petitioners further represent that the bond herein given by said Isidore Newman & Son was given and furnished by and for the use and benefit and at the cost and expense of your petitioners, who are the real parties in interest in this litigation.

WHEREFORE, petitioners pray leave to file this petition of intervention; that the plaintiff may be cited to appear and answer the same, and petitioner prays that thereafter there may be judgment in favor of petitioners and in favor of Isidore Newman & Son, defendant in this case, and against W. S. Lovell, Trustee of Knight, Yancey & Company, plaintiff, denying and rejecting the said plaintiff's demands and maintaining the defense herein set up by Isidore Newman & Son; and, petitioners pray for such other and further orders as the case may require and for all general and equitable relief.

(Signed) WHEELER, CORTIS & HAIGHT,
DART, KERNAN & DART,
Attorneys.

May, 27th., 1911.

Service accepted.

(Signed) Dufour & Dufour,
Attys for W. S. Lovell, Trustee.

UNITED STATES OF AMERICA,
STATE OF LOUISIANA,
PARISH OF ORLEANS,
CITY OF NEW ORLEANS:

Before me, the undersigned authority, personally came and appeared JOHN W. GRIFFIN, who, being by me first duly sworn, deposes and says:

That he is counsel for The Cotonificio Cantoni, the Cotonificio Furter, the Manifattura Tosi, Gianoli Brothers, and A. Bernocchi Brothers, the intervenors named in the foregoing petition; that each and all of the said intervenors are non-residents of the United States and are absent from this State and District and not otherwise represented herein than by affiant as attorney-at-law; and, that all and singular the facts and allegations in the foregoing petition contained are true and correct, to the best of affiant's knowledge and belief.

(signed) John W. Griffin,

Sworn to and subscribed before
me this 26th, day of May, 1911.

(seal) John R. Upton.
Not. Pub.

United States Circuit Court, Eastern District of Louisiana.
W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

ORDER.

Let the foregoing petition of intervention be filed and let the plaintiff and defendant herein be cited to appear and answer the same, as herein prayed and according to law.

NEW ORLEANS, May 31st, 1911.

(signed) RUFUS E. FOSTER,
JUDGE.

ANSWER OF PLAINTIFF TO INTERVENTION OF CATONIFICIO CANTONI, ET ALS.,

Filed May 31, 1911.

United States Circuit Court, Eastern District of Louisiana.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

Answer of W. S. Lovell, Trustee of Knight, Yancey & Company, to petition of intervention of Catonificio Cantoni, et als.

Now into Court comes W. S. Lovell, Trustee of Knight, Yancey & Company, plaintiff in the original suit and defendant in intervention, and for answer to petition of intervention herein filed by Catonificio Cantoni, et als, denies all and singular the allegations thereof.

Further answering, this respondent avers that as Trustee of Knight, Yancey & Company, Bankrupts, he has title to, and is the owner of the cotton referred to in the original petition herein filed, and that, therefore, he is entitled to recover the full value of said cotton from the defendants, Isidore Newman & Son, et als, as prayed for in his original petition herein filed.

WHEREFORE, respondent prays that the petition of intervention of Catonificio Cantoni, et als, be dismissed at their cost and for all general and equitable relief.

(Signed) PERCY, BENNERS & BURR,
DUFOUR & DUFOUR,

Attorneys for Respondents.

NOTE OF EVIDENCE.

Filed May 31, 1911.

United States Circuit Court, Eastern District of Louisiana.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

PROCEEDINGS HAD BEFORE THE HON. RUFUS E. FOSTER, UNITED STATES DISTRICT JUDGE, on the 24th day of May, 1911, in the above entitled and numbered cause.

APPEARANCES:

Messrs. Saunders, Dufour & Dufour and Percy Benners & Burr for plaintiff,

Messrs. Dart, Kernan & Dart and John W. Griffin for Defendants.

Mr. GRIFFIN: In pursuance of the right reserved in the first paragraph of the agreed statement of facts, I desire on behalf of the defendants to offer in evidence the documents referred to in the agreed statement of facts and marked Exhibits No. 1 to No. 58 inclusive.

I desire further to object to the following portions of the agreed statement of facts as irrelevant and immaterial.

To the last two sentences in paragraph three.

To so much of paragraphs eight as states, first, the date when the cotton was actually shipped; second, that it was acquired by Knight, Yancey & Company after the dates of the drafts and third, that a second set of bills of lading was issued.

To the whole of paragraph nine.

To Exhibits 59 to 71 inclusive.

MR. BENNERS: The plaintiff desires to object to the matters set forth in the second paragraph of the stipulation on the ground that the evidence is incompetent, irrelevant and, immaterial and tends to show no title in the defendants or the spinners to the cotton or any part of it. The plaintiff objects to the matters set forth in the third paragraph of the statement of facts on the same grounds, as above assigned. The plaintiff objects to the matters set forth in the fourth paragraph of the statement of facts on the same grounds. The plaintiff objects to the matters set forth in the fifth paragraph of the statement of facts on the same grounds. The plaintiff objects to the matters set forth in the sixth paragraph of the stipulation on the same grounds. The plaintiff objects to the matters set forth in the seventh paragraph of the stipulation on the same grounds. The plaintiff objects to the exhibits offered by the defendants on the same ground.

MR. DUFOUR: Plaintiff offers in evidence the original of the genuine bills of lading referred to in the statement of facts and marked Exhibits 59 to 71 inclusive.

MR. GRIFFIN: The defendants object to those documents on the grounds above stated.

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY.

vs. No. 13,889

ISIDORE NEWMAN & SON, ET AL.

STIPULATION AS TO VALUE OF CERTAIN LOTS OF COTTON, REFERRED TO IN THE PETITION,

Filed May 31, 1911.

NOTE:

Copied into the Bill of Exceptions at page 151 et seq., of the transcript.

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY.

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

STIPULATION AS TO EVIDENCE ON INTERVENTION,

Filed May 31, 1911.

NOTE:-

Copied into the Bill of Exceptions at page 152 et seq., of the Transcript.

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY.

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

REQUEST FOR FINDINGS OF FACT AND CONCLUSIONS OF LAW SUBMITTED ON BEHALF OF THE DEFENDANTS AND INTERVENING PETITIONERS.

Filed May 31, 1911.

NOTE:-

Copied into the Bill of Exceptions at page 161 et seq., of the transcript.

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY.

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

## FINDINGS OF FACT BY THE COURT.

Filed June 27, 1911.

NOTE:-

Copied into the Bill of Exceptions at page 175 et seq. of the transcript.

## OPINION.

Filed June 27, 1911.

United States Circuit Court, Eastern District of Louisiana.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & CO.

vs. No. 13,839

ISIDORE NEWMAN & SON.

This suit is by W. S. Lovell, Trustee of Knight, Yancey & Company, Bankrupts, against Isidore Newman & Son, sureties on a bond given by the master of the Steamship Ingelfingen. Certain parties in interest have intervened and joined the defendant, setting up the same defense.

The parties by stipulation have waived the jury and submitted the matter to me on an agreed statement of facts.

It appears that between December 15, 1909, and January 29, 1910, Knight, Yancey & Company, through their agent at Geona,

Gino Gavarati, entered into eight written contracts for the sale of 1400 bales of cotton to various Italian spinners, the contracts reading substantially as follows:

"Messrs .....,

.....

We beg to confirm that we have sold to you today for the account of Messrs. Knight, Yancy & Company, Decatur, (Alabama)
quantity, 200 bales (two hundred)
quality, fully low middling white number 8 type, sealed.
price, 7.50 per pound (seven pence and fifty-one hundredths)
terms, C. i. f. & 6% Genoa. Allowance on weight 1%.
Shipment January/February (by Cotoniera Line)
Conference Bill. Contract—Arbitration Liverpool.
Reimbursement 90 days sight draft Banca Commerciale Italiana, Milan, payable in London.

Gino Gavarati"

(Translated)

During January and February, 1910, without shipping any cotton at all, Knight, Yacey & Company counterfeited and forged 13 bills of lading, purporting to show the receipt of 1400 bales of cotton by the Soutnern Railway at points in Alabama, to be carried by the said railway to New Orleans and thence to Genoa by the Cotoniera Line, consigned to their own order, with instructions to notify Gino Gavarati. They then drew drafts for the value of the cotton at the price for which they had sold it and, annexing the fraudulent bills of lading, together with insurance certificates and invoices, the whole apparently in strict conformity to the contracts, discounted the drafts and obtained the money. The spinners ultimately paid the drafts.

Thereafter, on March 16 and 17 and April 1, 6, 7 and 11, 1910, Knight, Yancey & Company did ship 1400 bales of cotton precisely as they had pretended by the forged bills of lading, the grade, weight and marks of the cotton, the points of shipment and destination, the carriers, the form of the bill of lading and everything to the most minute particular being exactly as shown by the said documents.

On April 20, 1910, Knight, Yancey & Company were adjudicated bankrupts and receivers were appointed to take charge of their assets. The cotton had been transported to New Orleans. Eighty-nine bales had gone forward, but 1311 bales were then on board the Steamship Ingelfingen. Before the Ingelfingen cleared, the receivers proceeded against her in the district court of this district and, claiming the cotton, asked for an injunction to prevent its removal out of the United States pending the suit. The injunction issued, but the vessel was permitted to give bond and sail with the cotton. The condition of the bond is that the trustee shall establish his right, title and interest in and to the said cotton, or any part thereof, and it stipulates that suit may be brought against the surety alone.

Knight, Yancey & Company had the genuine bills of lading in their possession when adjudicated bankrupts, and plaintiff relies upon his possession of them, endorsed over to him by the bankrupts, and claims the absolute title to the cotton, disclaiming any intention to avoid a preference.

Defendants contend that Knight, Yancey & Company, by marking the exact amount of cotton, of the right grade, identically as shown in the forged bills of lading and other documents, and shipping it by the same carriers, in the same way, appropriated it to the said contracts; that delivery to the railroad was delivery to them; that Knight, Yancey & Company had no intention to retain title in themselves but intended to suppress the genuine bills of lading and permit the cotton to be claimed by the spinners on the forged bills of lading; that the trustee is estopped to contest their ownership of the cotton or the genuineness of the forged bills of lading.

To this plaintiff responds that the contracts called for January and February delivery, which was not complied with; that as the buyer could not have been compelled to accept delivery there was no appropriation; that delivery could only be made by endorsing and turning over the bills of lading; that Knight, Yancey & Company, by holding the genuine bills of lading, to their own order, retained the legal ownership of the cotton, and it passed to him on their adjudication as bankrupts and his election as trustee, and that as trustee there is no estoppel against him.

The able arguments and exhaustive citations of authority by counsel for both sides have been of great aid and I regret that I have not the time to discuss them fully. However, in my opinion, the problem here presented is readily solved by the application of well settled principles of law, the ultimate facts, which I am bound to find from the evidence before me, being once determined.

It is certain that Knight, Yancey & Company and the spinners entered into valid contracts of sale, and thereby Knight, Yancey & Company obligated themselves to deliver the goods and the spinners, to pay the price. By the contract, Knight, Yancey & Company were to make delivery not later than February 28, 1910, to a carrier at such point in the United States as they might select, the goods to be transported from the United States to Genoa by the Cotoniera Line. They were also obligated to insure the goods for the benefit of the purchasers and to pay the premium, to pay all inland charges and to allow for the freight to destination. The purchasers were obligated to accept drafts, when presented with bills of lading and other documents attached, showing compliance as to delivery, and to ultimately pay the drafts, I understand this to be the well settled meaning given to the terms of the contract by commercial usage, and even if this were not so, it is certainly the interpretation of the parties.

By false representations, Knight, Yancey & Company obtained payment before it was due, as they made no delivery, but they did subsequently make delivery of the cotton in exactly the manner contemplated. The delivery was accepted by the spinners and the contract thereby became executed, as each party had discharged his obligation. This was before bankruptcy.

The stipulations as to time of delivery, time and manner of payment, et cetera, were merely accidental, and the parties for whose benefit they were inserted could waive them without affecting the contract. Delivery was complete when the cotton was given into the custody of the carrier and it belonged to the buyer, subject, of course, to the lien of the bona fide holder of the bill of lading. Necessarily it was appropriated to the contract before delivery. The bill of lading to the order of Knight, Yancey & Company was solely to enable them to collect the pur-

chase price as if a cash transaction, according to the usage of the trade.

When they had received payment in advance, no matter how, their retention of the bill of lading gave them no right in or control over the cotton as against these defendants. No doubt Knight, Yancey & Company intended to suppress the genuine bills of lading and to let the cotton be claimed on the forged ones, but it is useless to speculate as to what their intentions were, or what they might or could have done in the premises, as the fact is that after receiving the bills of lading they did nothing, and no rights of innocent third persons are involved. At the moment of adjudication the cotton formed no part of the assets of Knight, Yancey & Company, and they had no lien on it nor right to retain the bills of lading. The trustee stands in no better position towards these defendants than did the bankrupts. He is subject to any equity that would have estopped them. It is clear that Knight, Yancey & Company could have asserted no claim to this cotton as against the buyers.

There will be judgment for the defendants and intervenors, rejecting the plaintiff's demand. And for costs.

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## JUDGMENT.

Extract from the Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, New Orleans Division.

April Term, 1911.

New Orleans, Tuesday, June 27, 1911.

Court met pursuant to adjournment:

Present, Hon. Rufus E. Foster, District Judge.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & CO.

versus No. 13,889

ISIDORE NEWMAN & SON.

The Counsel for the respective parties in this cause having filed a written stipulation waiving trial by jury, the said cause

came on to be heard before the Court at a former day upon the pleadings, exhibits, evidence and stipulations of facts, and was argued by Counsel and submitted—when the Court took the same under advisement;

Whereupon, and on due consideration thereof and for the reasons assigned by the Court in writing this day filed, the Court finds the law and evidence to be in favor of the Defendants and Intervenors, and against the Plaintiff.

It is therefore ordered, adjudged and decreed that there be judgment in favor of the Defendants, Isidore Newman & Son, and the Intervenors, the Cotonificio Cantoni, the Cotonificio Furter the Manifattura Tosi, Gianoli Brothers and A. Bernocchi Brothers, rejecting the demands of the Plaintiff, William S. Lovell, Trustee of Knight, Yancey & Company, and dismissing this suit at Plaintiff's costs.

Judgment rendered June 27, 1911,

Judgment signed July 1, 1911.

(Signed) Rufus E. Foster,
Judge.

## ORDER ALLOWING PLAINTIFF 60 DAYS TO FILE BILL OF EXCEPTIONS.

Extract from the Minutes, April Term 1911.

New Orleans, Friday, June 30, 1911.

Court met pursuant to adjournment.

Present: Hon. Rufus E. Foster, District Judge.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

On motion of Dufour & Dufour, of Counsel for Plaintiff herein,

It is ordered by the Court that an extension of sixty days from this date be granted to said Plaintiff as time in which to prepare and file his bill of exceptions in this cause.

## ORDER EXTENDING TIME FOR PRESENTING BILL OF EXCEPTIONS,

Filed August 30, 1911.

United States Circuit Court, Eastern District of Louisiana. New Orleans Division.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY

Plaintiff,

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

Defendants.

In this cause, the Court having entered an order on June 30th, 1911, allowing the plaintiff sixty (60) days for presenting bills of exception.

IT IS NOW ORDERED that said period be extended for an additional period of sixty (60) days from August 29th, 1911.

(Signed) Rufus E. Foster,
Judge.

## BILL OF EXCEPTIONS

Filed October 4, 1911.

United States Circuit Court, Eastern District of Louisiana.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY, Bankrupt,

Plaintiff,

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

Defendants.

THE CONTONIFICIO CANTONI; THE CONTONIFICIO FURTER; THE MANIFATTURA TOSI; GIANOLI BROTHERS; A. BERNOCCHI BROTHERS.

Intervenors.

### BILL OF EXCEPTIONS.

BE IT REMEMBERED, That on the trial of this cause in this Court, at the term thereof which included the months of May and June, 1911, the Honorable Rufus E. Foster, Judge, presiding, the following proceedings not otherwise appearing of record were had, to-wit:

The case was called for trial on the, to-wit, twenty fourth day of May, 1911, at which time came the parties by their attorneys, namely,

Messrs. Dufour & Dufour and
Percy, Benners & Burr,
Attorneys appearing for the Plaintiff,

and

Messrs. Wheeler, Cortis & Haight and
Dart, Kernan & Dart,
Attorneys appearing for the Defendants,

and thereupon, the parties waived a trial by jury in accordance with the statute in such cases made and provided, and filed in

this cause their waiver of such trial, said waiver being in words and figures as follows, to-wit:

"WAIVER OF JURY.

W. S. LOVELL, Trustee etc.

vs. No.

ISIDORE NEWMAN, ET AL.

STIPULATION.

Pursuant to Section 649 of the revised Statutes of the United States it is stipulated by and between the parties hereto, through their respective attorneys, that a jury be, and hereby is, waived and that the issues in this case be tried by the Court without the intervention of a jury.

New Orleans, May 24, 1911.

Dufour & Dufour,

Percy, Benners & Burr
Attorneys for Plaintiff.

Wheeler, Cortis & Haight,
Attorneys for Defendants.

Endorsed: Filed May 24th, 1911.
H. J. Carter, Clerk."

Thereupon there was filed in the cause and read to the Court the stipulation of the parties of the facts on which this cause was submitted to the Court for its decision and judgment, said stipulation being in words and figures as follows, to-wit:

## STIPULATION.

In the United States Circuit Court, Eastern District of Louisiana.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY

vs.

ISIDORE NEWMAN, ET AL.

It is hereby stipulated and agreed that the entire evidence in this case, in conflict with which neither party shall offer any evidence, subject to the right of either party to object to any of the matters herein set forth on the ground of irrelevancy and immateriality, but not as to form of proof, shall be as follows:

1. The existence of the corporations and co-partnerships mentioned in the fifth paragraph of the answer herein is admitted to be as therein alleged. Said corporations and co-partnerships are hereinafter referred to as the spinners.

2. On or about the dates stated in Exhibits 1 to 8, attached hereto, the spinners agreed respectively to purchase from Knight, Yancey & Company, and Knight, Yancey & Company agreed to sell to the spinners respectively, the quantities of cotton stated in the attached documents numbered Exhibits 1 to 8, inclusive. Said agreements were negotiated and concluded through one Gino Gavirati, a cotton broker residing at Milan, Italy. The said documents Exhibits 1 to 8 inclusive are the original brokers' memoranda of said contracts, and correctly state the terms thereof; transltaions thereof are attached as Exhibits 1-A to 8-A, both inclusive.

3. On or about the dates indicated therein respectively the firm of Knight, Yancey & Company, by or at instance of John W. Knight, the managing partner of said firm, made up and issued thirteen documents purporting to be bills of lading of the Southern Railway Company. Said documents were not, however, valid bills of lading of said Railway Company, but were signed by or at the instance of Knight, Yancey & Company acting through said John W. Knight, with the names of the agents

of said Railway Company, by whom bills of lading are customarily signed at the points where said pretended bills of lading purported to have been issued. Said pretended bills of lading were made up on the blank forms in use by said Railway Company. Said pretended bills of lading are hereto attached and marked Exhibits 9 to 21 inclusive. No cotton was in fact received by said Railway Company as recited in said pretended bills of lading. The statement in the last sentence is without prejudice to defendant's contention that the cotton received by the Railroad Company hereinafter referred to is referable to said pretended bills of lading.

4. Thereupon Knight, Yancey & Company, acting by said John W. Knight, drew thirteen drafts on the bankers mentioned in said contracts of sale respectively, who were the bankers of the spinners respectively and were authorized by the spinners to accept and pay the drafts to be drawn under said contracts of sale. Said drafts are hereto annexed and marked Exhibits 22 to 34 inclusive, and were drawn on the dates which they bear, respectively.

5. Knight, Yancey & Company, acting through John W. Knight, thereupon attached said drafts to said pretended bills of lading respectively, and also attached thereto respectively the certificates of insurance which are hereto attached and marked Exhibits 35 to 46 inclusive, and the invoices which are hereto attached and marked Exhibits 47 to 58 inclusive.

6. Knight, Yancey & Company, acting through said John W. Knight, thereupon indorsed said drafts, pretended bills of lading, and certificates of insurance in blank, and discounted said drafts, with the other documents mentioned above attached thereto respectively, with certain bankers, and received and retained the proceeds of said drafts, which amounted to the face of said drafts, less discount.

7. The purchasers of said drafts and attached documents thereupon sent them forward through their correspondents to the respective drawees for acceptance, and the same were by them accepted on the dates indicated by the acceptances appearing on the face of said drafts and the said pretended bills of lading were thereupon delivered to the spinners respectively. The said

drawees accepted the said drafts in good faith, and in reliance on the documents thereto attached, including the pretended bills of lading, which they and the spinners honestly believed to be genuine bills, representing goods actually shipped by carrier as therein stated. At the maturity of said drafts, they were paid in full by the respective drawees to the respective holders, and the said drawees have been duly reimbursed for said payments by the spinners respectively.

8. On the dates indicated in Exhibits 59 to 71 inclusive, respectively Knight, Yancey & Company actually shipped by the Southern Railway 1400 bales of their cotton, which was acquired by them after the dates of the drafts before mentioned, for which the agents of said Railway at the points of shipment issued thirteen bills of lading, which are hereto annexed and marked Exhibits 59 to 71 inclusive. Said cotton was marked by Knight, Yancey & Company with the marks indicated in said bills of lading, and was consigned as therein indicated, and was carried by said Railway Company to the port of Chalmette, where it was by said Railway Company delivered to the ocean carrier mentioned in said Bill of Lading. Said ocean carrier shipped eighty-nine bales thereof marked TSLL by the Steamship Sicania, and the remaining 1311 bales was the cotton mentioned in the restraining order issued by the United States District Court for the Eastern District of Louisiana on the 3rd day of May, 1910, and the same which is mentioned in the bond in suit. At the time when said order was issued, said 1311 bales was loaded on the Steamship Ingelfingen, a vessel of the Cotoniera Line.

9. Of the bills of lading, Exhibits 59 to 71, those dated at Decatur and marked PSEX, TSXS, TSST, TSLL, PSSI, QSMP, TSAG and QNET were retained by Knight, Yancey & Company from the time of their issuance by the Railway Company until the appointment of petitioner as their Trustee in bankruptcy, and were then indorsed and delivered to the petitioner by Knight, Yancey & Company; those dated at Selma. and marked SDON, TSCI, TSCZ, TSPG and TSIC were received by Charles A. Patterson, the duly authorized agent of Knight, Yancey & Company, at Selma, Alabama, with full authority in an about the matters herein referred to, from the Railway Company on the dates they severally bear, and thereafter were

by him indorsed for Knight, Yancey & Company, and in their names, and hypothecated with a bank in Selma, Alabama, as collateral security for advances of money made by it to Knight, Yancey & Company, and were by him thereafter attached to negotiable drafts drawn by said Patterson, as such agent, on Knight, Yancey & Company, at Decatur, Alabama, for sums of money approximating the value of the cotton covered by said bills of lading, payable to said bank at Selma, which drafts were accepted and paid by Knight, Yancey & Company, and said bills of lading thereupon delivered to them prior to the filing of the petition in bankruptcy, at Decatur, Alabama, on the 16th day of April, 1911, freed of any claim thereon on the part of the bank, and were by Knight, Yancey & Company retained until the appointment of petitioner as their trustee in bankruptcy, when they were delivered by them to said Trustee.

10. The signatures of Knight, Yancey & Company on the drafts hereto attached and marked Exhibits 22 to 34 inclusive are the genuine signatures of that firm, signed by said John W. Knight. The acceptances and endorsements thereon are the genuine acceptance and endorsements of the persons whose they purport to be and were placed thereon in due course. The endorsements of Knight, Yancey & Company on the pretended bills of lading, Exhibits 9 to 21, and on the insurance certificates, Exhibits 35 to 46, are the genuine endorsements of Knight, Yancey & Company placed thereon by said John W. Knight. The signatures of A. A. Raven and of Mather & Company on said insurance certificates are genuine. The insurers issuing said certificates had no knowledge that the cotton referred to therein was not shipped until they acquired such knowledge after the bankruptcy. Said certificates of insurance were delivered to Knight, Yancey & Company in blank by the insurers and were filled out by said Knight, Yancey & Company, which, by the terms of the open policy referred to in said certificates, they were legally authorized to do in cases where they were actually shipping cotton. No further insurance was effected by Knight, Yancey & Company on the cotton actually shipped by them as aforesaid.

11. The attached photographs, Exhibits 14 and 27, are photographs of the pretended bill of lading and of the draft marked

TSLL, and have the same force and effect as though they were the original documents. The pretended bill of lading marked TSLL bears the same endorsement in the same handwriting as the remainder of said pretended bills of lading. An invoice and a certificate of insurance similar to those hereto attached were attached to said pretended bill of lading marked TSLL. The invoice stated the date of order to be 1/15/10.

12. The endorsements of the pretended bills of lading marked PSSI, QSMP, TSAG and QNET by the Cotonificio Cantoni; and of the pretended bill of lading marked TSXS by Gianoli Brothers, were endorsements to their receiving agents at Genoa. Said endorsements did not transfer any right, title or interest which said Cotonificio Cantoni and said Gianoli Brothers may have had in said pretended bills of lading, or in said cotton to said receiving agents, but any such rights remained unaffected by said endorsements.

The memoranda of contract Exhibits 1 and 6 were concluded on cables sent by Knight, Yancey & Company on January 14th, 1910, and December 14th, 1909, respectively, and received by said Gavirati on the following day. Said memoranda were therefore dated by Gavirati on the day when he received said cables, whereas the invoices prepared by Knight, Yancey & Company, and marked TSXS, TSST, PSSI and QSMP, respectively (Exhibits 47, 48, 55 and 56), refer to the date when said cables were sent.

13. The individuals composing the partnership of Knight, Yancey & Company were individually adjudicated bankrupts pursuant to the act of Congress relating to Bankruptcy, at or about the time of the appointment of petitioner as Trustee in Bankruptcy of Knight, Yancey & Company; and the individual estates of said partners, taken in connection with the estate of said partnership, are not sufficient to pay the claims which have been proved in bankruptcy against said partnership. At all the times herein mentioned, the residences of the partners composing said firm of Knight, Yancey & Company were as follows: John W. Knight, Decatur, Alabama; Wm. J. Yancey, Memphis, Tennessee; Wm. D. Nesbitt, Birmingham, Alabama; and Robert H. Nesbitt, Spartanburg, South Carolina. The residence of petitioner is at Birmingham, Alabama. The residences of defend-

ants are in New Orleans, Louisiana. The amount in dispute is more than Two Thousand Dollars.

14. The cotton shipped as aforesaid was of the grades called for by said contracts of purchase, Exhibits 1 to 8 inclusive, respectively, and if the plaintiff is entitled to recovery he is entitled to recover the value of the cotton in the New Orleans market on the day when the restraining order was issued. Prior to the trial, the parties hereto are to agree on said market value per pound on that day and on the number of pounds in each of said lots of cotton, and to make a further stipulation to cover same. The defendant also claims, and the plaintiff denies, that the values so fixed ought to be reduced by the amount of any claim for dead freight which the ship or ocean carrier would have had against said cotton or the owner thereof, if said cotton had not gone forward on said vessel; and it is understood that the defendant may, on the trial hereof, offer evidence in proof of such claim for dead freight. It is agreed that said dead freight would be at the rate of twenty-three cents per 100 lbs.

15. Knight, Yancey & Company were duly adjudicated bankrupts by the District Court of the United States for the Northern District of Alabama, on, to wit: April 20th 1910. Clarence E. Frost, sometimes called C. E. Frost, and William S. Lovell, sometimes called W. S. Lovell, were duly appointed the Receivers in Bankruptcy of said bankrupt estate on, to wit: the 21st day of April, 1910, and were duly authorized by said Court to institute the proceedings to restrain the removal of said cotton referred to in the petition. A true copy of the record of the said proceedings, including the bonds given under the decree, is hereto attached. William S. Lovell was duly appointed Trustee in bankruptcy of Knight, Yancey & Company, in said bankruptcy proceedings, on May 26th 1910, and duly qualified as such.

16. Knight, Yancey & Company for five years or more prior to their bankruptcy were largely engaged in exporting cotton from the United States. It was the custom of Knight, Yancey & Company to use combinations of letters as identifying marks for the lots of cotton shipped by them, which combinations were never repeated unless by accident or at long intervals of time.

17. It is hereby agreed that trial by jury shall be waived and a separate stipulation to that effect be filed with the Clerk.

Dated, April 29th 1911.

(Signed) Dufour & Dufour,
Percy, Benners & Burr,
Attorneys for Plaintiff.
Wheeler, Cortis & Haight,
Dart, Kernan & Dart,
Attorneys for Defendants.

Thereupon, the plaintiff, by his attorneys, objected to the admission in evidence of the matters and things set forth in the second paragraph of the stipulation, which said second paragraph is in words and figures as follows, to-wit:

"2. On or about the dates stated in Exhibits 1 to 8, attached hereto, the spinners agreed respectively to purchase from Knight, Yancey & Company, and Knight, Yancey & Company agreed to sell to the spinners respectively, the quantities of cotton stated in the attached documents numbered Exhibits 1 to 8, inclusive. Said agreements were negotiated and concluded through one Gino Gavirati, a cotton broker residing at Milan, Italy. The said documents Exhibits 1 to 8, inclusive are the original brokers' memoranda of said contracts and correctly state the terms thereof, translations thereof are attached as Exhibits 1-A to 8-A, both inclusive."

on the ground that the evidence therein set forth is irrelevant and immaterial and does not show or tend to show any title, or right, or interest in the defendants, or either of them, or in the spinners, to the cotton the subject matter of this suit, or to any part of it; and thereupon the Court overruled the plaintiff's said objection, to which action of the Court the plaintiff then and there reserved his exception, and still reserves his exception and insists thereon, which exception was allowed by the Court.

Thereupon, the plaintiff, by his attorneys, objected to the admission in evidence of the matters and things set forth in the

third paragraph of the stipulation, which said third paragraph is in words and figures as follows, to-wit:

> "3. On or about the dates indicated therein respectively, the firm of Knight, Yancey & Company, by or at the instance of John W. Knight, the managing partner of said firm made up and issued thirteen documents purporting to be bills of lading of the Southern Railway Company. Said documents were not, however, valid bills of lading of said Railway Company, but were signed by or at the instance of Knight, Yancey & Company acting through said John W. Knight, with the names of the agents of said Railway Company, by whom bills of lading are customarily signed at the points where said pretended bills of lading purported to have been issued. Said pretended bills of lading were made up on the blank forms in use by said Railway Company. Said pretended bills of lading are hereto attached and marked Exhibits 9 to 21 inclusive. No cotton was in fact received by said Railway Company as recited in said pretended bills of lading. The statement in the last sentence is without prejudice to defendant's contention that the cotton received by the Railroad Company hereinafter referred to is referable to said pretended bills of lading."

on the ground that the evidence therein set forth is irrelevant and immaterial and does not show or tend to show any title, or right, or interest in the defendants, or either of them, or in the spinners, to the cotton the subject matter of this suit, or to any part of it; and thereupon the Court overruled the plaintiff's said objection, to which action of the Court the plaintiff then and there reserved his exception, and still reserves his exception and insists thereon, which exception was allowed by the Court.

Thereupon, the plaintiff, by his attorneys, objected to the admission in evidence of the matters and things set forth in the fourth paragraph of the stipulation, which said fourth paragraph is in words and figures as follows, to-wit:

> "Thereupon Knight, Yancey & Company, acting by said John W. Knight, drew thirteen drafts on the bankers

mentioned in said contracts of sale respectively, who were the bankers of the spinners respectively and were authorized by the spinners to accept and pay the drafts to be drawn under said contracts of sale. Said drafts are hereto annexed and marked Exhibits 22 to 34 inclusive, and were drawn on the dates which they bear respectively."

on the ground that the evidence therein set forth is irrelevant and immaterial and does not show or tend to show any title, or right, or interest in the defendants, or either of them, or in the spinners, to the cotton the subject matter of this suit, or to any part of it; and thereupon the Court overruled the plaintiff's said objection, to which action of the Court the plaintiff then and there reserved his exception, and still reserves his exception and insists thereon, which exception was allowed by the Court.

Thereupon, the plaintiff, by his attorneys, objected to the admission in evidence of the matters and things set forth in the fifth paragraph of the stipulation, which said fifth paragraph is in words and figures as follows, to-wit:

"5. Knight, Yancey & Company, acting through John W. Knight, thereupon attached said drafts to said pretended bills of lading respectively, and also attached thereto respectively the certificates of insurance which are hereto attached and marked Exhibits 35 to 46 inclusive, and the invoices which are hereto attached and marked Exhibits 47 to 58 inclusive."

on the ground that the evidence therein set forth is irrelevant and immaterial and does not show or tend to show and title, or right, or interest in the defendants, or either of them, or in the spinners, to the cotton the subject matter of this suit, or to any part of it; and thereupon the Court overruled the plaintiff's said objection, to which action of the Court the plaintiff then and there reserved his exception, and still reserves his exception and insists thereon, which exception was allowed by the Court.

Thereupon the plaintiff, by his attorneys, objected to the admission in evidence of the matters and things set forth in the

sixth paragraph of the stipulation, which said sixth paragraph is in words and figures as follows, to-wit:

> "6. Knight, Yancey & Company, acting through said John W. Knight, thereupon indorsed said drafts, pretended bills of lading, and certificates of insurance in blank, and discounted said drafts, with the other documents mentioned above attached thereto respectively, with certain bankers, and received and retained the proceeds of said drafts, which amounted to the face of said drafts, less discount."

on the ground that the evidence therein set forth is irrelevant and immaterial and does not show or tend to show any title, or right, or interest in the defendants, or either of them, or in the spinners, to the cotton the subject matter of this suit, or to any part of it, and thereupon the Court overruled the plaintiff's said objection, to which action of the Court the plaintiff then and there reserved his exception, and still reserves his exception and insists thereon, which exception was allowed by the Court.

Thereupon, plaintiff, by his attorneys, objected to the admission in evidence of the matters and things set forth in the seventh paragraph of the stipulation, which said seventh paragraph is in words and figures as follows, to-wit:

> "7. The purchasers of said drafts and attached documents, thereupon sent them forward through their correspondents to the respective drawees for acceptance, and the same were by them accepted on the dates indicated by the acceptances appearing on the face of said drafts and the said prtended bills of lading were thereupon delivered to the spinners respectively. The said drawees accepted the said drafts in good faith, and in reliance on the documents thereto attached, including the pretended bills of lading, which they and the spinners honestly believed to be genuine bills, representing goods actually shipped by carrier as therein stated. At the maturity of said drafts, they were

paid in full by the respective drawees to the respective holders, and the said drawees have been duly reimbursed for said payments by the spinners respectively."

on the ground that the evidence therein set forth is irrelevant and immaterial and does not show or tend to show any title, or right, or interest in the defendants or either of them, or in the spinners, to the cotton the subject matter of this suit, or to any part of it; and thereupon the Court overruled the plaintiff's said objection, to which action of the Court the plaintiff then and there reserved his exception, and still reserves his exception and insists thereon, which exception was allowed by the Court.

Thereupon the plaintiff offered in evidence and read to the Court the thirteen bills of lading referred to in the eighth paragraph of the stipulation and therein referred to as being marked "Exhibits 59 to 71" inclusive. Said bills of lading were all on printed forms of the same kind as Exhibit 59, which Exhibit 59 is in words and figures as follows, to-wit:

BILL OF LADING SIGNATURE CERTIFICATE No.....

11-11-10. 50 M. W. Form 411

SOUTHERN RAILWAY COMPANY
In Connection With Other Carriers On The Route

Export Bill of Lading No ) 147 Contract Number ) C-32-B From Decatur, Ala. To Genoa, Italy,

Received at Decatur, Ala. By——From Knight, Yancey & Co. the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, numbered, consigned and destined as indicated below:

Consignee and Destination )Shippers Order, Genoa, Italy,

Party to be Notified, Gino Gavirati, Genoa, Italy.

(In right hand margin.)

FOREST PRODUCTS.

Inland freight to be charged for and settled on basis of actual weight as ascertained at the seaboard, subject to a minimum of 30,000 lbs. per car.

If charges are to be prepaid, write or stamp here, "To be Prepaid."

Received $_____ to apply in prepayment of the charges on the property described hereon.

Agent

Per _____

The signature here acknowledges only the amount Prepaid

ARTICLES

One Hundred (100) Bales Cotton
Inland Freight Prepaid
Ocean Freight Collect

MARKS AND NUMBERS

Headbranded "KNIGHT"
1/100 T S X S

*Shippers Weight 50467 (Subject to correction)

(*U. S. Law requires Agent issuing Bill of Lading to write either "shipper's" or "carrier's" before "weight.")

To be carried to the Port (A) of New Orleans, La., and thence by La Cotoniera Line to the Port (B) Genoa, Italy, (or so near thereto as steamer may safely get, with liberty to call at any port or ports in or out of the customary route), and to be there delivered in like good order and condition as above consigned, or to consignee's assigns, or to another carrier on the route to destination if consigned beyond said port (B), upon payment immediately on discharge of the property of the freight thereon, at the rate from New Orleans to Genoa, Italy of

Twenty-three (23) cents .....
.....United States gold currency, per one hundred pounds GROSS WEIGHT, and advanced charges .....$.....), with all other charges and average, without any allowance of credit or discount; settlement to be made on the basis of 4 shillings, 2 pence, 4.25 marks, 5.25 francs, 2.50 Dutch guilders, 3.80 kroner to the dollar, United States gold currency; if in other currency than herein provided for, settlement to be made at the rate of $4.80 to the pound sterling, at the current rate of exchange officially quoted on the day the ocean steamer enters the Custom House at its port of discharge, for which banker's short-sight bills on London can be bought; when ocean freight is prepaid, $4.86 United States gold is equivalent to one pound sterling.

In consideration of the rate of freight herein named, it is hereby stipulated that the service to be performed hereunder shall be subject to the conditions, whether printed or written, herein contained, and said conditions are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable.

## CONDITIONS.

Any alteration, addition or erasure in this bill of Lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be void.

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(Printed on margin, paragraphs 1 to 14 inclusive.)

## ATTENTION OF SHIPPERS IS CALLED TO THE ACT OF CONGRESS OF 1851.

"Any person or persons shipping Oil of Vitriol, Unslaked Lime, Inflammable matches or Gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering AT THE TIME OF SHIPMENT a note in writing, expressing the nature and character of such merchandise to the master, mate or officer or person in charge of the loading of the ship or vessel, shall forfeit to the UNITED STATES ONE THOUSAND DOLLARS."

---

1.—With respect to the service until delivery at port (A) it is agreed that:-

1. No carrier or party in possession of all or any of the property herein described, shall be liable for any loss thereof or damage thereto unless caused by negligence of such carrier, by reason of (a) floods, fire, jettison, ice, collision, delay or quarantine, robbers, riots, strikes or a stoppage of labor; leakage, breakage, chafing loss thereof or damage thereto unless caused by negfrost or wet; country damage on cotton, exposure while being transported upon deck or upon open car, if it be necessary or if it is usual to so carry such property; or any cause beyond the control of the carrier or party.

2. No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable despatch as its general business will permit. Every carrier shall have the right, in case of necessity, to forward said property by any carrier between the point of shipment and the point to which the rate is given.

3. No carrier shall be liable for loss or damage not occurring on its portion of the route, nor after said property is ready for delivery to the next carrier. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation. Claims for loss or damage must be made in writing to the agent of the delivering carrier at ultimate destination promptly after arrival of the property, and if delayed for more than thirty (30) days after such delivery of the property, or after due time for such delivery thereof, no carrier hereunder shall be liable in any event.

4. All property shall be subject to necessary cooperage, baling and repairs at owner's cost. Each carrier

over whose route Cotton is to be carried hereunder shall have the privilege, of compressing the same, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. No carrier hereunder shall be liable for differences in weight or for shrinkage of any grain or seed carried in bulk.

5. Property not removed by connecting carrier within twenty-four hours after its arrival at the port (A) may be kept in the vessel, car, depot or place of delivery of the carrier, at the risk of the carrier as warehouseman only, or may be, at the option of the carrier, removed and otherwise stored in a public warehouse at the owner's cost, and there held subject to lien for all freight and other charges. Property taken from a station or wharf at which there is no regularly appointed agent, shall be entirely at risk of owner until loaded into car or vessel, and when received from private or other sidings, or wharves, shall be at owner's risk until the cars are attached to train or loaded into vessel. In case the whole or any part of the property specified herein be prevented by any cause from going from said port (A) in the first steamer of the exporting line above stated leaving after the arrival of such property at said port (A), the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or if deemed necessary, by any other steamer or line.

6. Property taken from a station or wharf at which there is no regularly appointed agent, or when received from private or other sidings or wharves, shall be at owner's risk until cars are attached to train or until unloaded into vessels. *The issue of this bill of lading prior to such actual possession of such property by the carrier shall not be interpreted to vary this stipulation.*

7. No carrier hereunder will carry, or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications, unless a special agreement to do so and a stipulated value of the articles are endorsed herein.

8. Every party, whether principal or agent, shipping inflammable, explosive, or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense, or destroyed without compensation.

9. If, upon inspection, it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped, and at the tariff rates, and under the rules provided for by published classification.

10. If all or any of said property is carried by water, such water carriage shall be performed subject to statutory acts and to all the conditions, whether printed or written, contained in this bill of lading, including the condition that no carrier by water shall be liable for any loss or damage resulting from explosion, accidents to boilers or machinery, or from any latent defects in hull, machinery or appurtenances, existing before, at the time, or after shipment, or sailing on the voyage, or unseaworthiness, provided the owners have exercised due diligence to make the vessel seaworthy; nor shall negligence be presumed against any carrier.

The carrier shall have the liberty to transfer, to transship, to lighter, to call at any port or ports, to tow and to be towed, to deviate to assist vessels in distress, to navigate without pilots, and to load and discharge goods at any time.

11. It is agreed that if any goods are sold short of ultimate destination, each carrier that has completed its part of the transportation shall have earned its agreed-upon proportion of the through freight, and the same with the charges advanced shall be due and payable out of the proceeds thereof; and for any distance carried, each carrier shall, on same basis, have earned and be entitled to freight, with charges advanced, for such part of the transportation as has been accomplished.

12. In case of quarantine the goods may be discharged at the risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regu-

lations or authorities, or for the carrier's dispatch, or at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when the goods are so discharged, or goods may be returned by carriers at owner's risk and expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to goods shall be borne by the owners of the goods or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection, or other acts required by quarantine regulations or authorities, even though same may have been done by carrier's officers, crew, agents or employees, nor for detention, loss or damage of any kind occasioned by quarantine or the enforcement thereof.

13. This contract is executed and accomplished and all liability hereunder terminates, upon delivery of said property to the exporting steamer, her master, agent or servants, or to the exporting steamship company, or on the pier usually used by the exporting steamer at the said port (A), whether or not the same may be the property of or used as a warehouse by the inland carrier also, and the inland freight and all other herein before provided for charges shall be a first lien, due and payable by the exporting steamer or exporting steamship company.

14. *The terms and conditions of this bill of lading shall and do supersede and annul all previous agreements with respect to the service herein stipulated to be performed.*

II.—With respect to the service after delivery at the port (A) first above mentioned, and until delivery at the port (B) second above mentioned, it is agreed that:-

1. The steamer shall have liberty to sail with or without pilots; that the carrier shall have liberty to convey goods in craft and / or lighters to and from the steamer at the risk of the owners of the goods; and in case the steamer shall put into a port of refuge, or be prevented from any cause from proceed-

ing in the ordinary course of her voyage, to transship the goods to their destination by any other steamer; that the carrier shall not be liable for loss or damage occasioned by fire from any cause or whatsoever occurring; by barratry of the master or crew; by enemies, pirates or robbers; by arrest or restraint of princes, rulers or people, riots, strikes, or a stoppage of labor, by explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, or unseaworthiness of the steamer, whether existing at time of shipment or at the beginning of the voyage, provided the owners have exercised due diligence to make the steamer seaworthy; by heating, frost, decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, vermin, or by explosion of any of the goods, whether shipped with or without disclosure of their nature, or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for inland damage; nor for the obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk, or transshipment; nor for any loss or damage caused by the prolongation of the voyage and that the carrier shall not be concluded as to correctness of statements herein of quality, quantity, gauge, contents, weight and value.

General Average payable according to York-Antwerp Rules. If the owner of the steamer shall have exercised due diligence to make said steamer in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew in the navigation or management of the steamer, or from latent or other defects, or unseaworthiness of the steamer, whether existing at time of shipment, or at the beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average, or for any special charges incurred, but, with the ship owner, shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defects or unseaworthiness.

2. That this shipment until the delivery at the port (B) second above mentioned, is subject to all the terms and provisions

of, and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of Feb., 1893, and entitled "An Act relating to the navigation of vessels, etc."

3. That the value of each package receipted for as above does not exceed the sum of one hundred dollars, unless otherwise stated herein, on which basis the rate of freight is adjusted.

4. That the carrier shall not be liable for articles specified in Section 4281 of the Revised Statutes of the United States, unless written notice of the true character and value thereof is given at the time of lading and entered in the bill of lading.

5. That shippers shall be liable for any loss or damage to steamer or cargo caused by inflammable, explosive or dangerous goods, shipped without full disclosure of their nature, whether such shipper be principal or agent; and such goods may be thrown overboard or destroyed at any time without compensation.

6. That the carrier shall have a lien on the goods for all freights, primages and charges, and also for all fines or damages which the steamer or cargo may incur or suffer by reason of the illegal, incorrect or insufficient marking, numbering, or addressing of packages or description of their contents.

7. That in case the steamer shall be prevented from reaching her destination by quarantine, the carrier may discharge the goods into any depot or lazaretto, and such discharge shall be deemed a final delivery under this contract, and all the expenses thereby incurred on the goods shall be a lein thereon.

8. That the steamer may commence discharging immediately on arrival, and discharge continuously, any custom of the port to the contrary notwithstanding, the Collector of the port being hereby authorized to grant a general order for discharge immediately on arrival, and if the goods be not taken from the steamer by the consignee directly they come to hand in discharging the steamer, the master or steamer's agent to be at liberty to enter and land the goods, or put them into craft or store at the owner's risk and expense, when the goods shall be deemed delivered and steamer's responsibility ended, but the steamer and carrier to have a lien on such goods until the payment of all costs and charges so incurred.

9. That if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

10. That full freight is payable on damaged or unsound goods; but no freight is due on any increase in bulk or weight caused by the absorption of water during the voyage.

11. That in the event of claims for short delivery when the steamer reaches her destination, the price shall be the market price at the port of destination on the day of the steamer's entry at the Custom House, less all charges saved, steamer being responsible only for such part of the goods as have been actually delivered to the steamer at the port (A) first above mentioned, and steamer not liable for any loss or damage that may have occurred before such delivery, while agreeing to promptly present to inland carriers for account of owners of goods any claims for shortage or loss or damage that may have occurred before delivery of goods at the port (A) first above mentioned.

12. That merchandise on wharf awaiting shipment or delivery be at shipper's risk of loss or damage not happening through the fault or negligence of the owner, master, agent or manager of the steamer, any custom of the port to the contrary notwithstanding.

13. That this bill of lading, duly endorsed, be given up to the steamer's consignee in exchange for delivery order.

14. That freight prepaid will not be returned, goods lost or not lost.

15. That parcels for different consignees, collected or made up in single packages addressed to one consignee, pay full freight on each parcel.

16. That freight payable on weight is to be paid on gross weight landed from ocean steamer, unless otherwise agreed to or herein otherwise provided, or unless the carrier elects to take the freight on the bill of lading weight, but inland freight and charges paid on wheat, peas, maize, or other grain, or seed, or other bulk articles, from point of shipment to seaboard, shall be paid by consignee at destination on the weight delivered on board ocean steamer.

17. It is stipulated that in case the whole or any part of the articles specified herein be prevented by any cause from going in the first steamer leaving after the arrival of such articles at said port, the carrier is only bound to forward them by succeeding steamers employed in the Steamship Line, or if deemed necessary by said carrier, it may forward them in other steamers.

18. That the property covered by this bill of lading is subject to all conditions expressed in the regular forms of bills of lading in use by the Steamship Company at time of shipment, and to all local rules and regulations at port of destination not expressly provided for by the clauses herein.

19. That if the goods are destined beyond the port (B) second above mentioned, the transshipment to connecting carrier shall be at the risk of the owner of the goods, but at steamer's expense, and that all liability of the Steamship Company hereunder terminates on due delivery to connecting carrier.

III.—With respect to the service after delivery at the port (B) second above mentioned, and until delivery at ultimate destination if destined beyond that port, it is agreed that:

1. In case the regular steamship service to final port of delivery should for any reason be suspended or interrupted, the carrier, at the option of the owner or consignee of the goods, or the holder of the bill of lading, may forward the goods to the nearest available port, this to be considered a final delivery; or to store them at the port (B) second above mentioned at the risk and expense of the goods until regular service to final port of destination is opened again.

2. That the property shall be subject exclusively to all the conditions of the carrier or carriers completing the transit; the duty of notification above provided for shall fall exclusively within the obligation of the carrier completing the transit, and no prior carrier shall be responsible for the fulfillment of that obligation.

AND FINALLY, in accepting this bill of lading, the shipper, owner and consignee of the goods and the holder of the bill of lading, agree to be bound by all of its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder.

*IN WITNESS WHEREOF, The Agent signing on behalf of the said the SOUTHERN RAILWAY COMPANY, and of the said exporting Steamship Company or exporting steamer and her owner, severally and not jointly, hath affirmed to two Bills of Lading, all of this tenor and date, one of which bills being accomplished, the others to stand void.*

*Dated at Decatur, Ala., April 6, 1910..*

T. G. MORROW, *Agent.*
*On behalf of carriers, severally but not jointly.*

(*Endorsed*) *KNIGHT, YANCEY & CO*

*Accepted.....*
*Shipper, as Owner or Agent or Agent for Owner.*

The foregoing bill of lading, "Exhibit 59," is endorsed on the back thereof, Knight, Yancey & Company."

By agreement of counsel, evidenced by their signatures hereinafter attached, it is agreed that the remainder of the bills of lading offered in evidence by the plaintiff shall not be set forth in this bill of exceptions at length, but that the material portions thereof shall be set forth instead, and the substance thereof is as follows, to-wit:

Exhibit 60 is identical in form with Exhibit 59 and is the bill of lading of the Southern Railway Company, signed by its agent, T. G. Morrow, acknowledging receipt of 100 bales of cotton Inland freight prepared, Ocean Freight collect, Head branded "Knight," and marked T. S. S. T. Received at Decatur, Alabama, from Knight, Yancy & Company, to be delivered to shipper's order, at Genoa, Italy, notify Gino Gavirati, Genoa, Italy, stating that the shipper's Weight is 50,323, to be carried to the port of New Orleans and thence via La Cotoniera Line to the port of Genoa, Italy. It is dated Decatur, Ala., April 7, 1910, signed by T. G. Marrow, Agent, and is endorsed Knight, Yancey & Company.

Exhibit 61 is the bill of lading of the Southern Railway Company, signed by its agents, T. G. Morrow, acknowledging receipt of 100 bales of cotton, Inland freight prepaid, Ocean freight collect, Headbranded "Knight" and marked P S E X to be carried from Decatur, Alabama, to Genoa, Italy, and acknowledging receipt at Decatur, Ala., from Knight, Yancey & Company, of said action, to be delivered to shippers order at Genoa, Italy, notify Gino Gavirati: of the shippers weight of 50.667; to be carried to the port of New Orleans, Louisiana, and thence via La Cotoniera Line to Genoa, Italy, and is dated April 11, 1910, and is endorsed Knight, Yancey & Company.

Exhibit 62 is the bill of lading of the Southern Railway Company, acknowledging receipt of 100 bales of cotton, Inland charges prepaid, Ocean charges collect, to be carried from Faunsdale, Alabama, to Genoa, Italy, and acknowledges receipt of said cotton from Knight, Yancey & Company, to be delivered to their order at Genoa, Italy, notify Gino Gavirati at Genoa, Italy; the cotton being marked "Knight" S D O N, of the weight of 50,596, to be carried to the port of New Orleans, La., and thence via La Cotoniera Line to Genoa, Italy. Dated Selma, Ala., April 7, 1910, signed by J. W. Hunter, D. F. Agent, and is endoresd Knight, Yancey & Company, by Chas. A. Patterson, agent.

Exhibit 63 is the bill of lading of the Southern Railway Company, acknowledging receipt from Knight, Yancey & Company at Selma, Ala., of 100 bales of cotton marked Knight T S C I, Inland charges prepaid, to be carried from Uniontown Ala., to Genoa, Italy, to be delivered to the order of shippers at Genoa, Italy, notify Gino Gavirati; of the weight of 50,498, to be carried to the port of New Orleans, La., and thence via La Cotoniera Line to Genoa, Italy, Dated Selma, Ala., April 7, 1910, and signed J. W. Hunter, D. F. Agent; and is endorsed Knight, Yancey & Co., by Chas. A. Patterson, Agent.

Exhibit 64 is the bill of lading of the Southern Railway Company acknowledging receipt from Knight, Yancey & Company at Decatur, Ala., of 100 bales of cotton, Inland freight prepaid, Ocean freight collect, Headbranded "Knight" and marked T S L L, to be carried from Decatur, Ala., to Genoa, Italy, and delivered to shippers order, Genoa, Italy, noti-

fy Gino Gavirati; of the weight of 50,487, to be carried to the Port of New Orleans, and thence via Creole Line to the port of Genoa, Italy. It is dated Decatur, Ala., March 16, 1910, and is signed by T. G. Morrow, Agent. It is endorsed Knight, Yancey & Company.

Exhibit 65 is the bill of lading of the Southern Railway Company, acknowledging receipt from Knight, Yancey & Company of 100 bales of cotton marked "Knight" T S C Z, inland charges prepaid, to be carried from Faunsdale, Ala., to Genoa, Italy, to be delivered to the orders of shippers at Genoa, Italy, notify Gino Gavirati; of the weight of 50,246, to be carried to the port of New Orleans, La., and thence via La Cotoniera Line to Genoa, Italy. Dated Selma, Ala., April 7, 1910, and is signed by J. W. Hunter, D. F. Agent, endorsed Knight, Yancey & Company, by Chas. A. Patterson, Agent.

Exhibit 66 is the bill of lading of the Southern Railway Company, acknowledging receipt from Knight, Yancey & Cmopany of 100 bales of cotton, Inland freight prepaid, marked "Knight" T SP G, to be carried from Uniontown, Ala., to Genoa, Italy, and to be delivered to the order of shippers at Genoa, Italy, notify Gino Gavirati, Genoa, Italy; of the weight of 50,460, to be carried to the port of New Orleans, La., thence via La Cotoniera Line to Genoa, Italy. Dated Selma, Ala., April 7, 1910. Signed J. W. Hunter, D. F. Agent, and is endorsed Knight, Yancey & Company by Chas. A. Patterson, Agent.

Exhibit 67 is the bill of lading of the Southern Railway Company acknowledging receipt from Knight, Yancey & Company, of 100 bales of cotton marked "Knight" T S I C, Inland charges prepaid, to be carried from Uniontown, Ala., to Genoa, Italy, and to be delivered to the order of the shippers, notify Gino Gavirati; Shippers weight 50,368; to be carried to the port of New Orleans, La., thence via La Cotoniera Line to Genoa, Italy. Dated Selma, Ala., April 7, 1910, signed by J. W. Hunter, D. F. Agent, and is endorsed Knight, Yancey & Company by Chas. A. Patterson, Agent.

Exhibit 68 is the bill of lading of the Southern Railway Company, acknowledging receipt from Knight, Yancey & Company of 150 bales of cotton, Inland freight prepaid, Ocean

freight collect, Headbranded "Knight" and marked P S S I, to be carried from Decartur Ala., to Genoa, Italy, and delivered to shippers order at Genoa, Italy, notify Gino Gavirati, Genoa, Italy; of the weight of 75,693, to be carried to the port of New Orleans, thence via La Cotoniera Line to Genoa, Italy. Dated Decatur, Ala., April 7, 1910, signed by T. G. Morrow, Agent, endorsed Knight, Yancey & Company.

Exhibit 69 is the bill of lading of the Southern Railway Company acknowledging receipt from Knight, Yancey & Company of 150 bales of cotton, Inland freight prepaid, Ocean freight collect, Headbranded "Knight" and marked Q S M P to be carried from Decartur, Ala., to Genoa, Italy, and to be delivered to shippers order at Genoa, Italy, notify Gino Gavirati, Genoa, Italy, of the weight of 76,300; to be carried to the port of New Orleans, La., and thence via La Cotoniera Line to Genoa, Italy. Dated Decatur, April 6, 1910, signed T. G. Morrow, Agent, and endorsed Knight, Yancey & Company.

Exhibit 70 is a bill of lading of the Southern Railway Company, acknowledging receipt from Knight, Yancey & Company of 100 bales of cotton, Inland freight prepaid, Ocean freight collect, and Headbranded "Knight" marked T S A G, to be carried from Decatur, Ala., to Genoa, Italy, and delivered to shippers order, Genoa, Italy, notify Gino Gavirati; of the weight of 49,986, to be carried to New Orleans, La., and thence via La Cotoniera Line to Genoa, Italy, Dated Decatur, Ala., April 11, 1910, signed by T. G. Morrow, Agent, and endorsed Knight, Yancey & Company.

Exhibit 71 is the bill of lading of the Southern Railway Company, acknowledging receipt from Knight, Yancey & Company of 100 bales of cotton, Inland freight prepaid, Ocean freight collect, to be carried from Decatur, Ala., to Genoa, Italy, cotton being Headbranded "Knight" and marked Q N E T, to be delivered to shippers order, Genoa, Italy, notify Gino Gavirati; weight 50,862, to be carried to the port of New Orleans, La., thence via La Cotoniera Line to Genoa, Italy. Dated Decatur, Ala., April 1, 1910, signed T. G. Morrow, Agent and endorsed Knight, Yancey & Company.

Thereupon the defendants offered in evidence and read to the Court, Exhibits 1 to 8 mentioned in the second paragraph

of the stipulation, which are in words and figures as follows, to-wit:

## ORIGINAL CONTRACTS.

GINO GAVIRATI
MILANO

Exhibit 1.

Via Morone, 2
Milano, 15 Gennaio 1910.

Sigg. Fratelli Gianoli
Vigevano.

Ci pregiamo confermarvi che vi abbiamo oggi

VENDUTO

per conto dei Sigg. Knight, Yancey & Co. Decatur (Alabama)

| | |
|---|---|
| quantita | 200 bl (duecento) |
| qualita | fullylowmiddling white al tipo N 8-suggellato |
| prezzo | 7. 50 p lb (setta denarie cinquanta cent.) |
| condizioni | Cif & 6% Genova. Toll peso 1%. Imbarco Gennaio/Febbraio (p Cotoniera Line). Conference Bill. Contratto - arbitraggio Liverpool. Rimborso 90 g/v/ Banca Commerciale Italiana Milano pag. Londra. |

Gino Gavirati.

La pesatura e l' estrazione dei campioni dovra essere fatta al porto di sbarco coll'intervento dell'incaricato della casa venditrice.

GINO GAVIRATI
MILANO

Exhibit 2.
Via Morone, 2
Milano, 28 Dicembre 1909

Signori ANTONIO BERNOCCHI & FRATELLI
LEGNANO

Ci pregiamo confermarvi che vi abbiamo oggi

VENDUTO

per conto dei Sigg Knight Yancey & C, Decatur Alabama

quantita 300 Balle (trecento)

qualita 1/3 Fullygoodmiddling al camp. No. 11 - 1/3 Good middling al cam. No. 12 - 1/3 Fullymiddling al camp. No. 13 - tutto light tinged.

prezzo a 8.15 p. lb. (otto denari e quindici centesimi)

condiziona Cif & 6% Genova - Tolleranza peso 1% - Conference Bill - Imbarco Febbraio 1910 - Campioni suggellati, in vostre mani - -Rimborso 180 giorni vista sulla Banca Commerciale Italiana, Milano pag. Londra. Classificazione, contratto ed arbitraggio di Liverpool.

Gino Gavirati.

La Pesatura e l'estrazione dei campioni dovra essere fatta al porto di sbarco coll'intervento dell'incaricato della Casa venditrice.

Exhibit 3.

GINO GAVIRATI
MILANO

Via Morone, 2
Milano, 29 Gennaio 1910.

Spett. Manifattura Tosi,

Busto Arsizio.

Ci pregiamo confermarvi che vi abbiamo oggi

VENDUTO

per conto dei Sigg. Knight, Yancey & Co. Decatur, (Ala.)

quantita 600 Balle (seicento)

qualita 1/3 Fulleymiddling gc 28 m/m - 1/3 Middling gc. 28 m/m - 1/3 Fullylowmiddling al tipo N. 8 in v/ mani.

prezzo a 15/100 " on " Marzo/Aprile Liverpool -

condizioni Cif & 6% Genoa. Tolleranza peso 1% - Conference Bill.

Imbarco Febbraio. Class. contratto ed arbitr. di Liverpool.

Vostra facolta di fissare il prezzo fino al 25 Aprille 1910. Rimborso mediante tratta documentaria a 180 g/v

sulla Banca Commerciale Italiana, Milano, pag Londra.

Gino Gavirati.

La pesatura e l'estrazione dei campioni dovra essere fatta al porto di sbaraco coll 'intervento dell 'incaricato della Casa Venditrice.

EXHIBIT 4.

GINO GAVIRATI
MILANO

Via Morone, 2
Milano, 15 Gennaio 1910.

Spett. Manifattura Tosi

Busto, Arsizio.

Ci pregiamo confermarvi che vi abbiamo oggi per conto dei Sigg. Knight, Yancey & Co. Decatur, (Alabama)

quantita 500 balle (cinquecento balle)
qualita fullylowmiddling white al tipo N 8, suggellato.
prezzo 7.50 p. lb (sette denari e cinquante cent.)
condizioni Cif & 6% Genova Toll. peso 1%.
Imbarco Gennaio/Febbraio. Confer. Bill. Contratto ed arbitraggio di Liverpool. Rimborso 180 g/v sulla Banca Comm. le Italiana, Milano, pag. Londra.

Gino Gavirati.

La pesatura e l'estrazione dei campioni dovra essere fatta al porto di sbarco coll'intervento dell'incaricato della Casa venditrice.

Exhibit 5.

GINO GAVIRATI
MILANO

Via Morone, 2
Milano, 12 Gennaio 1910.

Spett. Cotonificio Furter

Citta.

Ci pregiamo confermarvi che vi abbiamo oggi

VENDUTO

per conto dei Sigg. Knight, Yancey & Co. Decatur, (Alabama)

| | |
|---|---|
| quantita | 500 balle (cinquecento) |
| qualita | fullylowmiddling white al tipo No. 8, suggellato. |
| prezzo | "pass price" Marzo/Aprile deliv. Liverpool. |
| condizioni | Cif & 6% Genova. Toll. peso 1%. |

Imbarco: 200 balle Gennaio
300 " Febbraio.

Conference Bill. vapori della "Cotoniera Line."
Vostra facolta di fissare il prezzo fino al gno 25 Aprile 1910. Rimborso a 180 g/v No. sulla Banca Comm. le Italiana, Milano, pag. Londra.
Classificazione, contratto ed arbitraggio di Liverpool.

Gino Gavirati.

No. sa lvo conferma dalla Casa.
La pesatura e l'estrazione dei campioni dovra essere fatta al porto di sbarco coll'intervento dell'incaricato della Casa venditrice.

Exhibit 6.

GINO GAVIRATI
MILANO

Via Morone, 2
Milano, 15 Dicembre 1909.

Spett. Cotonificio Cantoni

Citta.

Ci pregiamo confermarvi che vi abbiamo oggi

VENDUTO

per conto dei Sigg. Knight, Yancey & Co. Decatur, (Alabama)

quantita 900 balle (novecento)
qualita 1/3 fullygoodmiddling light tinged - 1/3 goodmiddling light tinged - 1/3 fullymiddl. light tinged.
prezzo 7.85 p. ib/ (sette denari e ottantacinque cent.)
condizioni Cif. & 6% Genova. Toll. peso 1%.
Imbarco meta Gennaio - metta Febbraio 1910.
Conference Bill. Imbarco per "Cotoniera Line."
Classificazione contratto ed arbitraggio Liverpool
Rimborso 90 g/v/ sul Swiss Bankverein, Londra.

Gino Gavirati.

La pesatura e l'estrazione dei campioni dovra essere fatta al porto di sbarco coll'intervento dell'incaricato della Casa venditrice.

Exhibit 7.

GINO GAVIRATI
MILANO Via Morone, 2

Milano, 13 Gennaio 1910.

Spett. Cotonificio Cantoni
Citti

Ci pregiamo confermarvi che vi abbiamo oggi

VENDUTO

per conto dei Sigg. Knight, Yancey & C. Dectaur, (Alabama)

| | |
|---|---|
| quantita | 300 balle (trecento) |
| qualita | fullylowmiddling white al tipo No 8, suggellato. |
| prezzo | at "pass price" March/ April Liverpool. |
| condizioni | Cif & 6% Genova. Toll. peso 1%. |
| | Imbarco Gennaio/Febbraio. Conference Bill |
| | Imbarco su vapori della "Cotoniera Line" |
| | Rimborso 90 g/v/ su Fred. Huth & Co. Londra. |
| | Liverpool class & Arbitraggio. |

Gino Gavirati.

La pesatura e l'estrazione dei campioni dovra essere fatta al porto di sbarco coll'intervento dell'incaricato della Casa venditrice.

Exhibit 8.

GINO GAVIRATI
MILANO Via Morone, 2

Milano, 25 Gennaio 1910.

Spett. Cotonificio Cantoni,
Milano.

Ci pregiamo confermarvi che vi abbiamo oggi

VENDUTO

per conto dei Sigg. Knight, Yancey & C. Decatur, (Alabama.

| | |
|---|---|
| quantita | 100 balle (cento balle) |
| qualita | Alabama Goodmiddling. g. c. 28 m/m |
| prezzo | a. d. 7.78 (denari sette e settantotto centesimi per lb) |
| condizioni | Cif & 6% Genova Tolleranza peso 1% Conference Bill. Imbarco Gennaio/Febbraio per "La Cotoniera" Classificazione contratto ed arbitraggio di Liverpool Rimborso 90 g/v sul Credito Italiano Milano, pagabile Londra. |

Gino Gavirati.

La pesatura e l'estrazione dei campioni dovra essere fatta al porto di sbarco coll'intervento dell'incaricato della Casa venditrice.

To the admission in evidence of the original contracts Exhibits 1 to 8 inclusive, and to each of them separately and severally, plaintiff objected on the ground that they were irrelevant and immaterial evidence and did not show or tend to show any right, title or interest in the cotton the subject matter of this suit, or any part thereof, in the defendants, or either of them or in the spinners, which objection of the plaintiff the Court then and there overruled, to which action of the Court plaintiff then and

there severally and separately excepted, which exceptions were by the Court allowed and on which the plaintiff still insists.

Thereupon, defendants offered in evidence and read to the Court Exhibits 1-A to 8-A, both inclusive, mentioned in the second paragraph of the stipulation, the same being translations of Ehibits 1 to 8 inclusive, said translations being in the words and figures as follows, to-wit:

TRANSLATIONS OF CONTRACTS.

EXHIBIT 1-A.

GINO GAVIRATI
MILAN Via Morone, 2

MILANO, January 15, 1910.

Messrs. Gianoli Bros.,
Vigevano.

We beg to confirm that we have sold to you to-day for the account of Messrs. Knight, Yancey & Co., Decatur (Alabama)

quantity 200 bales (two hundred)
quality fullylowmiddling white No 8 type, sealed.
price 7.50 per lb. (seven pence and fifty one-hundredths)
terms. C.i.f. & 6% Genoa. Allowance on weight 1%.
Shipment January/ February (by "Cotoniera Line")
Conference Bill. Contract - Arbitration Liverpool.
Reimbursement 90 days sight draft Banca Commerciale Italiana, Milan, payable in London.

Gino Gavirati.

The weighing and extraction of samples is to be done at the port of arrival with the intervention of the selling firm's representative.

EXHIBIT 2-A

GINO GAVIRATI
MILAN Via Morone, 2

MILAN, December 28, 1909.

Messrs Antonio Bernocchi & Brothers,
Legnano.

We beg to confirm that we have sold to you to-day for the account of Messrs. Knight, Yancey & Co., Decatur (Alabama)

quantity 300 bales (Three hundred)

quality 1/3 Fullygoodmiddling as per sample No 11 - 1/3 Goodmiddling as per sample No 12 - 1/3 Fullymiddling as per sample No 13, all light tinged.

price at 8.15 per lb (Eight pence and fifteen one-hundredths)

terms C.i.f. & 6% Genoa. Allowance on weight 1%. Conference Bill. Shipment February 1910. Sealed samples in your hands Reimbursements 180 days sight draft on the Banca Commerciale Italiana, Milano, Payable in London, Liverpool classification, Contract and arbitration.

Gino Gavirati.

The weighing and extraction of samples is to be done at the port of arrival with the intervention of the selling firm's representative.

EXHIBIT 3-A

GINO GAVIRATI
MILAN Via Morone, 2

MILAN, January 29, 1910.

Est. Manifattura Tosi,
Busto Arsizio.

We beg to confirm we have sold to you to-day for the account of Messrs. Knight, Yancey & Co., Decatur. (Ala)

| | |
|---|---|
| quantity | 600 Bales (Six hundred) |
| quality | 1/3 Fullymiddling gc. 28 m/m - 1/3 middling gc. 28 m/m, 1/3 Fullylowmiddling No 8 type in your hands |
| price | at 15/100 "on" March/April - Liverpool. |
| terms | C.i.f. & 6% Genoa. Allowance on weight 1%. Conference Bill. Shipment in February. Liverpool classification, contract and arbitration. At your option to fix the price until April 25, 1910. Reimbursement by documentary draft at 180 days' sight on the Banca Commerciale Italiana, Milan, payable in London. |

Gino Gavirati.

The weighing and extraction of samples is to be done at the port of arrival with the intervention of the selling firm's representative.

## EXHIBIT 4-A

GINO GAVIRATI
MILAN Via Morone, 2

MILAN, January 15, 1910.

Est. Manifattura Tosi,

Busto Arsizio.

We beg to confirm that we have sold to you to-day for the account of Messrs. Knight, Yancey & Co., Decatur (Alabama)

quantity 500 bales (five hundred bales)
quality fullylowmiddling white No 8 type, sealed
price 7.50 per lb. (seven pence and fifty-one-hundredths)
terms C.i.f. & 6% Genoa. Allowance on weight 1%. Shipment January/February. Conference Bill. Liverpool contract and arbitration. Reimbursements 180 days' sight draft on the Banca Commerciale Italiana, Milan. Payable in London.

Gino Gavirati.

The weighing and extraction of samples is to be made at the port of arrival with the intervention of the selling firm's representative.

## EXHIBIT 5-A

GINO GAVIRATI
MILANO Via Morone, 2

MILANO, January 12, 1910

Est. Furter Cotton Mills,

City.

We beg to confirm that we have sold to you to-day for the account of Messrs. Knight, Yancey & Co., Decatur (Alabama)

| | |
|---|---|
| quantity | 500 bales (five hundred) |
| quality | fullylowmiddling white No 8 type, sealed. |
| price | "pass price" March/April deliver Liverpool. |
| terms | C.i.f. & 6% Genoa. Allowance on weight 1%. Shipment: |

200 bales January
300 bales February.
Conference Bill. "Cotoniera Line" steamers. At your option to fix price until the 25th of April, 1910. Reimbursement with 180 sight draft * on the Banca Commerciale Italiana, Milan, payable in London. Liverpool classification. Contract and arbitration.

Gino Gavirati.

*Subject to the firms confirmation.

The weighing and extraction of samples is to be done at the port of arrival with the intervention of the selling firm's representative.

EXHIBIT 6-A

GINO GAVIRATI
MILAN Via Morone, 2

Milan, December 15, 1909.

Est. Cantoni Cotton Mills,
City.

We beg to confirm that we have sold to you to-day for the account of Messrs. Knight, Yancey & Co., Decatur (Alabama)

quantity 900 bales (nine hundred)

quality 1/3 fullygood middling light tinged - - 1/3 goodmiddling light tinged - 1/3 fullymiddl. light tinged.

price 7.85 per lb. (seven pence and eighty-five-one-hundredths)

terms C.i.f. & 6% Genoa. Allowance on weight 1%. Shipment one-half in January, one half in February, 1910. Conference Bill. Shipment by "Cotoniera Line." Liverpool classification, contract and arbitration.

Reimbursement with 90 days' sight draft on the Swiss Bank-verein, London.

Gino Gavirati.

The weighing and extraction of samples is to be done at the port of arrival with the intervention of the selling firm's representative.

EXHXIBIT 7-A

GINO GAVIRATI
MILAN Via Morone, 2

MILAN, January 13, 1910.

Est. Cantoni Cotton Mills,
City.

We beg to confirm we have sold to you to-day for the account of Messrs. Knight, Yancey & Co., Decatur (Alabama)

quantity 300 bales (three hundred)
quality fullylowmiddling white No 8 type, sealed.
price at "pass price" March/April Liverpool.
terms C.i.f. & 6% Genoa. Allowance on weight 1%. Shipments January/February. Conference Bill. Shipment by the "Cotoniera Line" steamers.
Reimbursement with 90 days' sight draft on Fred. Huth & Co. London.
Liverpool classification and arbitration.

Gino Gavirati.

The weighing and extraction of samples is to be done at the port of arrival with the intervention of the selling firm's representative.

EXHIBIT 8-A

GINO GAVIRATI

MILAN Via Morone, 2

MILAN, January 25, 1910.

Est. Cantoni Cotton Mills,

MILAN.

We beg to confirm we have sold to you to-day for the account of Messrs. Knight, Yancey & Co. of Decatur (Alabama)

quantity 100 Bales (one hundred bales)

quality Alabama Goodmiddling g.c. 28 m/m.

price at 7.78 (seven pence and seventy-eight-one-hundredths per lb.)

terms C.i.f. & 6% Genoa. Allowance on weight 1%. Conference Bill. Shipment January/February by the "La Cotoniera." Liverpool classification. contract and arbitration. Reimbursement with 90 days' sight draft on the Credito Italiano, Milan payable in London.

Gino Gavirati.

The weighing and extraction of samples is to be done at the port of arrival with the intervention of the selling firm's representative.

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To the admission in evidence of said translations, Exhibits 1-A to 8-A, both inclusive, and to each of them plaintiff severally

and separately objected on the ground that they were irrelevant and immaterial evidence and did not show or tend to show any right, title or interest in the cotton the subject matter of this suit, or any part thereof, in the defendants, or either of them, or in the spinners, which objections were by the Court severally and separately overruled, to which action to the Court plaintiff by leave of Court then and there excepted and still insists upon his exception.

Thereupon the defendants offered in evidence the thirteen pretended bills of lading referred to in the third paragraph of the stipulation. Said pretended bills of lading are all filled out on the same kind of printed forms; Exhibit 9 being one of said pretended bills of lading is in words and figures as follows, to-wit:

12-24-08 25M. B93734 Form 411—(New Form)
Revised to Nov., 1908.

SOUTHERN RAILWAY COMPANY

In connection with other carriers on the Route

---

Export Bill ) Contract)
of Lading No.) . . Number) . . From Decatur Ala To Genoa Italy

Received at . . Decatur Ala . . By Southern Ry Co From Knight Yancey & Co the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, numbered, consigned and destined as indicated below:

Consignee and)
Destination ) . . Shippers Order Genoa Italy.....

Party to be Notified. .Notify Gino Gavirati.....

| MARKS AND NUMBERS | ARTICLES |
|---|---|
| | (In right hand margin.)<br>FOREST PRODUCTS.<br>Inland freight to be charged for and settled on basis of actual weight as ascertained at the seaboard, subject to a minimum of 30,000 lbs. per car. |
| T S X S<br>1/100<br>Headbranded Knight | one Hundred (100) Bales Cotton<br><br>Inland Freight Prepaid<br>Ocean Freight Collect<br><br>*.....Weight . .50467 lbs.....<br>(Subject to correction).....<br>(*U. S. Law requires Agent issuing Bill of Lading to write either "shipper's" or "carrier's" before "weight.") |

To be carried to the Port (A) of New Orleans La and thence by La Cotoniera Line to the Port (B) Genoa Italy (or so near thereto as steamer may safely get, with liberty to call at any port or ports in or out of the customary route), and to be there delivered in like good order and condition as above consigned, or to consignee's assigns, or to another carrier on the route to destination if consigned beyond said port (B), upon payment immediately on discharge of the property of the freight thereon, at the rate from New Orleans La to Genoa Italy of Twenty-Three (23) cents per 100 lbs

United States gold currency, per one hundred pounds GROSS WEIGHT, and advanced charges Inland Charges Paid), with all other charges and average, without any allowance of credit or

discount; settlement to be made on the basis of 4 shillings 2 pence, 4.25 marks, 5.25 francs, 2.50 Dutch guilders, 3.80 kroner to the dollar, United States gold currency; if in other currency than herein provided for, settlement to be made at the rate of $4.80 to the pound sterling, at the current rate of exchange officially quoted on the day the ocean steamer enters the Custom House at its port of discharge, for which banker's short-sight bills on London can be bought; when ocean freight is prepaid, $4.86 United States gold is equivalent to one pound sterling.

In consideration of the rate of freight herein named, it is hereby stipulated that the service to be performed hereunder shall be subject to the conditions, whether printed or written, herein contained and said conditions are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable.

## CONDITIONS.

Any alteration, addition or erasure in this bill of lading which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be void.

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(In left hand margin, from paragraph 1 to 14, inclusive.)

## ATTENTION OF SHIPPERS IS CALLED TO THE ACT OF CONGRESS OF 1851.

"Any person or persons shipping Oil of Vitriol, Unslaked Lime, Inflammable Matches or Gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering AT THE TIME OF SHIPMENT a note in writing, expressing the nature and character of such merchandise to the master, mate or officer or person in charge of the loading of the ship or vessel, shall forfeit to the UNITED STATES ONE THOUSAND DOLLARS."

---

I.—With respect to the service until delivery at the port (A) it is agreed that:

1 No carrier or party in possession of all or any of the property herein described, shall be liable for any loss thereof or damage thereto unless caused by negligence of such carrier by reason of (a) floods, fire, jettison, ice, collision, delay or quarantine, robbers, riots, strikes or a stoppage of labor; leakage, breakage, chafing, loss of weight, decay, vermin, changes in weather, heat, frost or wet; country damage on cotton, exposure while being transported upon deck or upon open car, if it be necessary or if it is usual to so carry such property; or any cause beyond the control of the carrier or party.

2 No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market, or otherwise than with as reasonable despatch as its general business will permit. Every carrier shall have the right, in case of necessity, to forward said property by any carrier between the point of shipment and the point to which the rate is given.

3 No carrier shall be liable for loss or damage not occurring on its portion of the route, nor after said property is ready for delivery to the next carrier. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which event such lower value shall be the maximum price to govern such computation. Claims for loss or damage must be made in writing to the agent of the delivering carrier at ultimate destination promptly after arrival of the property, and if delayed for more than thirty (30) days after such delivery of the property, or after due time for such delivery thereof, no carrier hereunder shall be liable in any event.

4. All property shall be subject to necessary cooperage, baling and repairs at owner's cost. Each carrier over whose route Cotton is to be carried hereunder shall have

the privilege of compressing the same, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. No carrier hereunder shall be liable for differences in weight or for shrinkage of any grain or seed carried in bulk.

5. Property not removed by connecting carrier within twenty-four hours after its arrival at the port (A) may be kept in the vessel, car, depot or place of delivery of the carrier, at the risk of the carrier as warehouseman only, or may be, at the option of the carrier, removed and otherwise stored in a public warehouse at the owner's cost, and there held subject to lien for all freight and other charges. Property taken from a station or wharf at which there is no regular appointed agent, shall be entirely at risk of owner until loaded into car or vessel, and when received from private or other sidings, or wharves, shall be at owner's risk until the cars are attached to train or loaded into vessel. In case the whole or any part of the property specified herein be prevented by any cause from going from said port (A) in the first steamer of the exporting line above stated leaving after the arrival of such property at said port (A), the carrier hereunder then in possession is at liberty to forward said property by succeeding steamer of said line, or if deemed necessary, by any other steamer or line.

6. Property taken from a station at which there is no regularly appointed agent shall be entirely at risk of owner until loaded into cars, and when received from private or other sidings, shall be at owner's risk until the cars are attached to train.

7 No carrier hereunder will carry, or be liable in any way for any documents, specie or for any article of extraordinary value not specifically rated in the published classifications, unless a special agreement to do so and a stipulated value of the articles are endorsed herein.

8. Every party, whether principal or agent, shipping inflammable, explosive, or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and

such goods may be warehoused at owner's risk and expense, or destroyed without compensation.

9. If, upon inspection, it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped, and at the tariff rates, and under the rules provided for by published classification.

10 If all or any of said property is carried by water, such water carriage shall be performed subject to statutory acts and to all the conditions whether printed or written, contained in this bill of lading, including the condition that no carrier by water shall be liable for any loss or damage resulting from explosion, accidents to boilers or machinery, or from any latent defects in hull, machinery or appurtenances existing before, at the time, or after shipment, or sailing on the voyage, or unseaworthiness, provided the owners have exercised due diligence to make the vessel seaworthy; nor shall negligence be presumed against any carrier.

The carrier shall have the liberty to transfer, to tranship, to lighter, to call at any port or ports, to tow and to be towed, to deviate to assist vessels in distress, to navigate without pilots, and to load and discharge goods at any time.

11 It is agreed that if any goods are sold short of ultimate destination, each carrier that has completed its part of the transportation shall have earned its agreed-upon proportion of the through freight and the same with the charges advanced shall be due and payable out of the proceeds thereof; and for any distance carried, each carrier shall, on same basis, have earned and be entitled to freight, with charges advanced for such part of the transportation as has been accomplished.

12 In case of quarantine the goods may be discharged at the risk and expense of owners into quarantine depot or elsewhere, as required by quarantine regulations or authorities, or for the carrier's despatch, or at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when the goods are so

discharged, or goods may be returned by carriers at owner's risk and expense to shipping point, earning freight both ways. Quarantine expenses of whatever nature or kind upon or in respect to goods shall be borne by the owners of the goods or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection, or other acts required by quarantine regulations or authorities, even though same may have been done by carrier's officers, crew, agents or employees, nor for detention, loss or damage of any kind occasioned by quarantine or the enforcement thereof.

13 This contract is executed and accomplished, and all liability hereunder terminates, upon delivery of said property to the exporting steamer, her master, agent or servants, or to the exporting steamship company, or on the pier usually used by the exporting steamer at the said port (A), whether or not the same may be the property of or used as a warehouse by the inland carrier also, and the inland freight and all other hereinbefore provided for charges shall be a first lein, due and payable by the exporting steamer or exporting steamship company.

14 *The terms and conditions of this bill of lading shall and do supersede and annul all previous agreements with respect to the service herein stipulated to be performed.*

II.—With respect to the service after delivery at the port (A) first above mentioned, and until delivery at the port (B) second above mentioned, it is agreed that:—

1 The steamer shall have liberty to sail with or without pilots; that the carrier shall have liberty to convey goods in craft and/or lighters to and from the steamer at the risk of the owners of the goods; and in case the steamer shall put into a port of refuge, or be prevented from any cause from proceeding in the ordinary course of her voyage, to transship the goods to their destination by any other steamer; that the carrier shall not be liable for loss or damage occasioned by fire from any cause or wheresoever occurring; by barratry of the master or crew; by enemies, pirates or robbers; by arrest or restraint of princes, rulers or people, riots, strikes, or a stoppage of labor; by explosion, burst-

ing of boilers, breakage of shafts, or any latent defect in hull, machinery or appurtenances, or unseaworthiness of the steamer whether existing at time of shipment or at the beginning of the voyage, provided the owners have exercised due diligence to make the steamer seaworthy; by heating, frost decay, putrefaction, rust, sweat, change of character, drainage, leakage, breakage, vermin, or by explosion of any of the goods, whether shipped with or without disclosure of their nature, or any loss or damage arising from the nature of the goods or the insufficiency of packages; nor for inland damage; nor for the obliteration, errors, insufficiency or absence of marks, numbers, address or description; nor for risk of craft, hulk, or transshipment; nor for any loss or damage caused by the prolongation of the voyage, and that the carrier shall not be concluded as to correctness of statements herein of quality, quantity, gauge, contents, weight and value.

General Average payable according to York-Antwerp Rules. If the owner of the steamer shall have exercised due diligence to make said steamer in all respects seaworthy and properly manned, equipped and supplied, it is hereby agreed that in case of danger, damage or disaster resulting from fault or negligence of the pilot, master or crew in the navigation or management of the steamer, or from latent or other defects, or unseaworthiness of the steamer whether existing at time of shipment, or at the beginning of the voyage, but not discoverable by due diligence, the consignees or owners of the cargo shall not be exempted from liability for contribution in General Average, or for any special charges incurred, but, with the ship owner, shall contribute in General Average, and shall pay such special charges, as if such danger, damage or disaster had not resulted from such fault, negligence, latent or other defects or unseaworthiness.

2. That this shipment until delivery at the port (B) second above mentioned, is subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States, approved on the 13th day of Feb., 1893, and entitled "An Act relating to the navigation of vessels," etc.

3. That the value of each package receipted for as above does not exceed the sum of one hundred dollars unless otherwise stated herein, on which basis the rate of freight is adjusted.

4. That the carrier shall not be liable for articles specified in Section 4281 of the Revised Statutes of the United States, unless written notice of the true character and value thereof is given at the time of lading and entered in the bill of lading.

5. That shippers shall be liable for any loss or damage to steamer or cargo caused by inflammable, explosive or dangerous goods shipped without full disclosure of their nature, whether such shipper be principal or agent; and such goods may be thrown overboard or destroyed at any time without compensation.

6 That the carrier shall have a lien on the goods for all freights, primages and charges, and also for all fines or damages which the steamer or cargo may incur or suffer by reason of the illegal, incorrect or insufficient marking, numbering, or addressing of packages or description of their contents.

7 That in case the steamer shall be prevented from reaching her destination by quarantine, the carrier may discharge the goods into any depot or lazaretto, and such discharge shall be deemed a final delivery under this contract, and all the expenses thereby incurred on the goods shall be a lien thereon.

8 That the steamer may commence discharging immediately on arrival, and discharge continuously, any custom of the port to the contrary notwithstanding, the Collector of the port being hereby authorized to grant a general order for discharge immediately on arrival, and if the goods be not taken from the steamer by the consignee directly they come to hand in discharging the steamer, the master or steamer's agent to be at liberty to enter and land the goods, or put them into craft or store at the owner's risk and expense, when the goods shall be deemed delivered and steamer's responsibility ended, but the steamer and carrier to have a lien on such goods until the payment of all costs and charges so incurred.

9 That if on a sale of the goods at destination for freight and charges, the proceeds fail to cover said freight and charges, the carrier shall be entitled to recover the difference from the shipper.

10 That full freight is payable on damaged or unsound goods; but no freight is due on any increase in bulk or weight caused by the absorption of water du[illegible]e voyage.

11 That in the event of cl[illegible]s for short delivery when the steamer reaches her destination, the price shall be the market price at the port of destination on the day of the steamer's entry at the Custom House, less all charges saved, steamer being responsible only for such part of the goods as have been actually delivered to the steamer at the port (A) first above mentioned, and steamer not liable for any loss or damage that may have occurred before such delivery, while agreeing to promptly present to inland carriers for account of owners of goods any claims for shortage or loss or damage that may have occurred before delivery of goods at the port (A) first above mentioned.

12 That merchandise on wharf awaiting shipment or delivery be at shipper's risk of loss or damage not happening through the fault or negligence of the owner, master, agent or manager of the steamer, any custom of the port to the contrary notwithstanding.

13 That this bill of lading, duly endorsed, be given up to the steamer's consignee in exchange for delivery order.

14 That freight prepaid will not be returned, goods lost or not lost.

15 That parcels for different consignees, collected or made up in single packages addressed to one consignee, pay full freight on each parcel.

16 That freight payable on weight is to be paid on gross weight landed from ocean steamer, unless otherwise agreed to or herein otherwise provided, or unless the carrier elects to take the freight on the bill of lading weight, but inland freight and charges paid on wheat, peas, maize, or other grain, or seed, or other bulk articles, from point of shipment to s[illegible]board, shall be paid by consignee at destination on the weight delivered on board ocean steamer.

17 It is stipulated that in case the whole or any part of the articles specified herein be prevented by any cause from going in the first steamer leaving after the arrival of such articles at said port, the carrier is only bound to forward them by succeed-

ing steamers employed in the Steamship Line, or if deemed necessary by said carrier, it may forward them in other steamers.

18 That the property covered by this bill of lading is subject to all conditions expressed in the regular forms of bills of lading in use by the Steamship Company at time of shipment, and to all local rules and regulations at port of destination not expressly provided for by the clauses herein.

19 That if the goods are destined beyond the port (B) second above mentioned, the transshipment to connecting carrier shall be at the risk of the owner of the goods, but at steamer's expense, and that all liability of the Steamship Company hereunder terminates on due delivery to connecting carrier.

III.—With respect to the service after delivery at the port (B) second above mentioned, and until delivery at ultimate destination if destined beyond that port, it is agred that:—

1 In case the regular steamship service to final port of delivery should for any reason be suspended or interrupted, the carrier, at the option of the owner or consignee of the goods, or the holder of the bill of lading, may forward the goods to the nearest available port, this to be considered a final delivery; or to store them at the port (B) second above mentioned at the risk and expense of the goods until regular service to final port of destination is opened again.

2 That the property shall be subject exclusively to all the conditions of the carrier or carriers completing the transit; the duty of notification above provided for shall fall exclusively within the obligation of the carrier completing the transit, and no prior carrier shall be responsible for the fulfilment of that obligation.

AND FINALLY, in accepting this bill of lading, the shipper, owner and consignee of the goods and the holder of the bill of lading, agree to be bound by all of its stipulations, exceptions and conditions, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee or holder.

IN WITNESS WHEREOF, The Agent signing on behalf of the said the SOUTHERN RAILWAY COMPANY, and of the

said exporting Steamship Company or exporting steamer and her owner, severally and not jointly, hath affirmed to Two Bills of Lading, all of this tenor and date, one of which bills being accomplished, the other to stand void.

Jan 21 1910

Dated at Decatur, Ala..... this ..... day of..... 190..

T. G. Morrow.....Agent,
On behalf of carriers, severally but not jointly.

(In pencil) (Endorsed) KNIGHT, YANCEY & CO.

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By agreement of counsel, evidenced by their signatures hereinafter attached, it is agreed that Exhibits 10 to 21, both inclusive, shall not be set out in full, but the material portions thereof are as follows, to-wit:

Exhibit 10 purports to be the bill of lading of the Southern Railway Company, acknowledging receipt from Knight, Yancey & Company of 100 bales of cotton, Inland freight prepaid, Ocean freight collect, Headbranded "Knight" and marked T S S T, to be carried from Decatur, Ala., to Genoa, Italy, and there delivered to shippers order, notify Gino Gavirati; of the weight 50,323 lbs.; to be carried to the port of New Orleans, La., and thence via La Cotoniera Line to Genoa, Italy. Said bill of lading purports to be dated Decatur, Ala., January 24/1910, and to be signed by T. G. Morrow, Agent.

Exhibit 11 purports to be the bill of lading of the Southern Railway Company acknowledging receipt from Knight, Yancey & Company of 100 bales of cotton, Inland freight prepaid, Ocean freight collect, Headbranded "Knight" and marked P S E X, to be carried from Decatur, Ala., to Genoa, Italy and delivered to shippers order, Genoa, Italy, notify Gino Gavirati;

of the weight 50,687 lbs.; to be carried to the port of New Orleans, La., thence via La Cotoniera Line to Genoa, Italy, purports to be dated Decatur, Ala., Feb. 7, 1910, and to be signed by T. G. Morrow, Agent.

Exhibit 12 purports to be the bill of lading of the Southern Railway Company, acknowledging receipt from Knight, Yancey & Company of 100 bales of cotton, Inland freight prepaid, Ocean freight collect, Headbranded "Knight" and marked S D O N, to be carried from Selma, Ala., to Genoa, Italy, and there delivered to shippers order, notify Gino Gavirati; of the weight 50,596 lbs., to be carried to the port of New Orleans, La., and thence via La Cotoniera Line to Genoa, Italy. Said bill of lading purports to be dated Selma, Ala., Feb. 7, 1911, and to be signed by J. W. Hunter, D. F. Agent.

Exhibit 13 purports to be the bill of lading of the Southern Railway Company, acknowledging receipt from Knight, Yancey & Company of 100 bales of cotton, Inland freight prepaid. Ocean freight collect, Headbranded "Knight" and marked T S. C. I, to be carried from Selma, Ala., to Genoa, Italy, and there delivered to shippers order, notify Gino Gavirati; of the weight of 50,498 lbs.; to be carried to the port of New Orleans, La., and thence via La Cotoniera Line at Genoa, Italy. Said bill of lading purports to be dated Selma, Ala., Feb. 7, 1910, and to be signed by J. W. Hunter, D. F. Agent.

Exhibit 14 purports to be the bill of lading of the Southern Railway Company, acknowledging receipt from Knight, Yancey & Company of 100 bales of cotton, Inland freight prepaid, Ocean freight collect, Headbranded "Knight" and marked T S L L, to be carried from Decatur, Ala., to Genoa, Italy, and there delivered to shippers order, notify Gino Gavirati; of the weight 50,487 lbs.; to be carried to the port of New Orleans, La., and thence via the Creole Line to Genoa, Italy. Said bill of lading purports to be dated Decatur, Ala., Jany. 18th, 1910, and to be signed by T. G. Morrow, Agent.

Exhibit 15 purports to be the bill of lading of the Southern Railway Company, acknowledging receipt from Knight, Yancey & Company of 100 bales of cotton, Inland freight prepaid, Ocean

freight collect, Headbranded "Knight" and marked T S C Z; to be carried from Selma, Ala., to Genoa, Italy, and there delivered to shippers order, notify Gino Gavirati; of the weight 50,246 lbs.; to be carried to the port of New Orleans, La., and thence via La Cotoniera Line to Genoa, Italy. Said bill of lading purports to be dated Selma, Ala., Feb. 1, 1910, and to be signed by J. W. Hunter, D. F. Agent.

Exhibit 16 purports to be the bill of lading of the Southern Railway Company, acknowledging receipt from Knight, Yancey & Company of 100 bales of cotton, Inland freight prepaid, Ocean freight collect, Headbranded, "Knight" and marked T S P G, to be carried from Selma, Ala., to Genoa, Italy, and there delivered to shippers order, notify Gino Gavirati; of the weight of 50,460 lbs.; to be carried to the port of New Orleans, La., and thence via La Cotoniera Line to Genoa, Italy. Said bill of lading purports to be dated Selma, Ala., Feb. 1, 1910, and to be signed by J. W. Hunter, D. F. Agent.

Exhibit 17 purports to be the bill of lading of the Southern Railway Company, acknowledging receipt from Knight, Yancey & Company of 100 bales of cotton, Inland freight prepaid, Ocean freight collect, Headbranded "Knight" and marked T S I C, to be carried from Selma, Ala., to Genoa, Italy, and there delivered to shippers order, notify Gino Gavirati; of the weight of 50,368 lbs.; to be carried to the port of New Orleans, La., and thence via La Cotoniera Line to Genoa, Italy. Said bill of lading purports to be dated Selma, Ala., Feb. 1, 1910, and to be signed by J. W. Hunter, D. F. Agent.

Exhibit 18 purports to be the bill of lading of the Southern Railway Company, acknowledging receipt from Knight, Yancey & Company of 150 bales of cotton, Inland freight prepaid, Ocean freight collect, Headbranded "Knight" and marked P S S I; to be carried from Decatur, Ala., to Genoa, Italy, and there delivered to shippers order, notify Gino Gavirati; of the weight 75,693 lbs.; to be carried to the port of New Orleans, La., and thence via La Cotoniera Line to Genoa, Italy. Said bill of lading purports to be dated Decatur, Ala., Feb. 1, 1910, and to be signed by T. G. Morrow, Agent .

Exhibit 19 purports to be the bill of lading of the Southern Railway Company, acknowledging receipt of 150 bales of cotton. Inland freight prepaid, Ocean freight collect, Headbranded "Knight" and marked Q S M P; to be carried from Decatur, Ala., to Genoa, Italy. and there delivered to shippers order, notify Gino Gavirati; of the weight 76,300 lbs.; to be carried to the port of New Orleans, La., and thence via La Cotoniera Line to Genoa, Italy. Said bill of lading purports to be dated Decatur, Ala., Feb. 1, 1910, and to be signed by T. G. Morrow, Agent.

Exhibit 20 purports to be the bill of lading of the Southern Railway Company, acknowledging receipt of 100 bales of cotton, Inland freight prepaid, Ocean freight collect, Headbranded "Knight" and marked T S A G; to be carried from Decatur, Ala., to Genoa, Italy, and there delivered to shippers order, notify Gino Gavirati; of the weight 49,986 lbs.; to be carried to the port of New Orleans, La., and thence via La Cotoniera Line to Genoa, Italy. Said bill of lading purports to be dated Decatur, Ala., Jan. 20, 1910, and to be signed by T. G. Morrow, Agent.

Exhibit 21 purports to be the bill of lading of the Southern Railway Company, acknowledging receipt from Knight, Yancey & Company of 100 bales of cotton, Inland freight prepaid, Ocean freight collect, Headbranded "Knight" and marked Q N E T, to be carried from Decatur, Ala., to Genoa, Italy, and there delivered to shippers order, notify Gino Gavirati; of the weight 50,862 lbs.; to be carried to the port of New Orleans, La., and thence via La Cotoniera Line to Genoa, Italy. Said bill of lading purports to be dated Decatur, Ala., Jan. 31, 1910, and to be signed by T. G. Morrow, Agent.

Exhibits 9 to 21 both inclusive are each endorsed Knight, Yancey & Co.

Plaintiff thereupon objected to the admission in evidence of Exhibit 9 on the ground that it was incompetent, irrelevant and immaterial evidence, and did not show or tend to show any right, title or interest in the cotton the subject matter of this suit, or any part thereof, in the defendants, or either of them, or in the spinners, which objection was by the Court overruled; to

which action of the Court plaintiff then and there excepted, which exception was allowed and on which plaintiff still insists.

Plaintiff thereupon objected to the admission in evidence of Exhibit 10 on the ground that it was irrelevant and immaterial evidence, and did not show or tend to show any right, title or interest in the cotton the subject matter of this suit, or any part thereof, in the defendants, or either of them, or in the spinners, which objection was by the Court overruled; to which action of the Court plaintiff then and there excepted, which exception was allowed and on which plaintiff still insists.

Plaintiff thereupon objected to the admission in evidence of Exhibit 11 on the ground that it was irrelevant and immaterial evidence, and did not show or tend to show any right, title or interest in the cotton tht subject matter of this suit, or any part thereof, in the defendants, or either of them, or in the spinners, which objection was by the Court overruled; to which action of the Court plaintiff then and there excepted, which exception was allowed and on which plaintiff still insists.

Plaintiff thereupon objected to the admission in evidence of Exhibit 12 on the ground that it was irrelevant and immaterial evidence and did not show or tend to show any right, title or interest in the cotton the subject matter of this suit, or any part thereof, in the defendants, or either of them, or in the spinners, which objection was by the Court overruled, to which action of the Court plaintiff then and there excepted, which exception was allowed and on which plaintiff still insists.

Plaintiff thereupon objected to the admission in evidence of Exhibit 13 on the ground that it was irrelevant and immaterial evidence and did not show or tend to show any right, title or interest in the cotton the subject matter of this suit, or any part thereof, in the defendants, or either of them, or in the spinners, which objection was by the Court overruled; to which action of the Court plaintiff then and there excepted, which exception was allowed and on which plaintiff still insists.

Plaintiff thereupon objected to the admission in evidence of Exhibit 14 on the ground that it was irrelevant and immaterial evidence and did not show or tend to show any right, title or

interest in the cotton the subject matter of this suit, or any part thereof, in the defendants, or either of them, or in the spinners, which objection was by the Court overruled; to which action of the Court plaintiff then and there excepted, which exception was allowed and on which plaintiff still insists.

Plaintiff thereupon objected to the admission in evidence of Exhibit 15 on the ground that it was irrelevant and immaterial evidence and did not show or tend to show any right, title or interest in the cotton the subject matter of this suit, or any part thereof, in the defendants, or either of them, or in the spinners, which objection of the plaintiff was by the Court overruled; to which action of the Court plaintiff then and there excepted, which exception was allowed and on which plaintiff still insists.

Plaintiff thereupon objected to the admission in evidence of Exhibit 16 on the ground that it was irrelevant and immaterial evidence, and did not show or tend to show any right, title or interest in the cotton the subject matter of this suit, or any part thereof, in the defendants, or either of them, or in the spinners, which objection was by the Court overruled; to which action of the Court plaintiff then and there excepted, which exception was allowed and on which plaintiff still insists.

Plaintiff thereupon objected to the admission in evidence of Exhibit 17 on the ground that it was irrelevant and immaterial evidence and did not show or tend to show any right, title or interest in the cotton the subject matter of this suit, or any part thereof, in the defendants, or either of them, or in the spinners, which objection was by the Court overruled; to which action of the Court plaintiff then and there excepted, which exception was allowed and on which plaintiff still insists.

Plaintiff thereupon objected to the admission in evidence of Exhibit 18 on the ground that it was irrelevant and immaterial evidence and did not show or tend to show any right, title or interest in the cotton the subject matter of this suit, or any part thereof, in the defendants, or either of them, or in the spinners, which objection was by the Court overruled; to which action of the Court plaintiff then and there excepted, which exception was allowed and on which plaintiff still insists.

Plaintiff thereupon objected to the admission in evidence of Exhibit 19 on the ground that it was irrelevant and immaterial

evidence and did not show or tend to show any right, title or interest in the cotton, the subject matter of this suit, or any part thereof, in the defendants, or either of them, or in the spinners, which objection was by the Court overruled; to which action of the Court plaintiff then and there excepted, which exception was allowed and on which plaintiff still insists.

Plaintiff thereupon objected to the admission in evidence of Exhibit 20 on the ground that it was irrelevant and immaterial evidence and did not show or tend to show any right, title or interest in the cotton, the subject matter of this suit, or any part thereof, in the defendants, or either of them, or in the spinners, which objection was by the Court overruled, to which action of the Court plaintiff then and there excepted, which exception was allowed and on which plaintiff still insists.

Plaintiff thereupon objected to the admission in evidence of Exhibit 21 on the ground that it was irrelevant and immaterial evidence and did not show or tend to show any right, title or interest in the cotton, the subject matter of this suit, or any part thereof, in the defendants, or either of them, or in the spinners, which objection was by the Court overruled, to which action of the Court plaintiff then and there excepted, which exception was allowed and on which plaintiff still insists.

Thereupon the defendants offered in evidence the drafts referred to in paragraph four of the stipulation as Exhibits 22 to 34 inclusive, which drafts are in words and figures as follows, to-wit:

Exhibit 22

1 Knight, Yancey & Co.
Cotton
Decatur, Ala., U. S. A.

Exchange for
£1458.5.9

Decatur, Ala., U. S. A.

January 21, 1910.

Ninety days after sight of this First of Exchange (Second unpaid) pay to the Order of ourselves Fourteen hundred and

fifty eight pounds five shillings and 9 d. Value received and charge the same to account of 100/TSXS Bales of cotton.

To Banca Commerciale Italiana (Pay London)

Milan, Italy,

Knight, Yancey & Co.

No. 6131
(In margin)
Sale date
1/14
Grade
Type 8

Exhibit 23

I Knight, Yancey & Co.
Cotton
Decatur, Ala., U. S. A.

Exchange for
£1454 2 9

Decatur, Ala., U. S. A.

January 24th., 1910.

Ninety days after sight of this First of Exchange (Second unpaid) pay to the order of ourselves Fourteen hundred and fifty four pounds two shillings and 9 d. Value received and charge the same to account of 100/TSST bales of cotton.

To Banca Commerciale Italiana (Pay London)

Milan, Italy

Knight, Yancey & Co.

No. 6132
(In margin)
Sale Date
1/14
Grade
Type 8.

Exhibit 24.

I Knight, Yancey & Co.
Cotton
Decatur, Ala., U.S.A.

Exchange for
£1573.16.9

Decatur, Ala., U. S. A.

February 7th, 1910.

One hundred and eighty days after sight of this First of Exchange (second unpaid) pay to the order of ourselves, Fifteen hundred and seventy three pounds, sixteen shillings and 9d. Value received and charge the same to account of 100/PSEX bales of cotton.

To Banca Commerciale Italiana (Pay London)

Milan, Italy

Knight, Yancey & Co.

No. 6294
(In margin)
Sale date
2/28
Grade
Type 11.

Exhibit 25.

1 Knight, Yancey & Co.
Cotton
Decatur, Ala., U. S. A.

Exchange for
£1547.5.0

Decatur, Ala., U. S. A.

February 8th, 1910.

One hundred and eighty days after sight of this First of Exchange (Second unpaid) pay to the Order of Ourselves

Fifteen Hundred and Forty seven pounds and five shillings. Value received and charge the same to account of 100/SDON bales of cotton.

To Banca Commerciale Italiana (Pay London)

Milan, Italy

Knight, Yancey & Co.

No. 6319

Exhibit 26.

I Knight, Yancey & Co.
Cotton
Decatur, Ala., U. S. A.

Exchange for
£1544.-5.-2

Decatur, Ala., U. S. A.

February 8th, 1910.

One hundred and eighty days after sight of this First of Exchange (second unpaid) pay to the order of Ourselves Fifteen hundred and forty four pounds five shillings and 2d. Value received and charge the same to account of 100/TSCI bales of cotton.

To Banca Commerciale Italiana (Pay London)

Milan, Italy

Knight, Yancey & Co.

No. 6320
(In margin)

Grade
Type 8.

Exhibit 27.

I Knight, Yancey & Co.
Cotton
Decatur, Ala., U. S. A.
Exchange for

£-1459 3 7

Decatur, Ala., U. S. A.

January 18th, 1910.

One hundred and eighty days after sight of this First of Exchange (second unpaid) pay to the order of ourselves Fourteen hundred and fifty nine pounds three shillings and 7d. Value received and charge the same to account of 100/TSLL bales of cotton.

To Banca Commerciale Italiana (Pay London)

Milan, Italy

Knight, Yancey & Co.

No. 6134
(In margin)
Grade
Type
No. 6.

Exhibit 28.

I Knight, Yancey & Co.
Cotton
Decatur, Ala., U. S. A.
Exchange for
£1445.0.8

Decatur, Ala., U. S. A.

February 2nd, 1910.

One hundred and eighty days after sight of this First of Exchange (second unpaid) pay to the order of ourselves, Four-

teen hundred and forty five pounds and 8d. Value received and charge the same to account of 100/TSCZ bales of cotton.

To Banca Commerciale Italiana (Pay London)

Milan, Italy

Knight, Yancey & Co.

No. 6274
(In margin)
Sale Date
1/12
Grade
Type No. 8.

Exhibit 29.

I Knight, Yancey & Co.
Cotton
Decatur, Ala., U. S. A.

Exchange for
£1451 3 9

Decatur, Ala. U. S. A.

February 2nd., 1910.

One hundred and eighty days after sight of this First of Exchange (second unpaid) pay to the order of Ourselves Fourteen hundred and fifty one pounds three shillings and 9 d. Value received and charge the same to account of 100/TSPG bales of cotton.

To Banca Commerciale Italiana (Pay London)

Milan, Italy

Knight, Yancey & Co.

No. 6276
(In margin)
Sale date
1/12
Grade
Type No. 8.

Exhibit 30.

I Knight, Yancey & Co.
Cotton
Decatur, Ala., U. S. A.

Exchange for
£1448 10 5

Decatur, Ala., U. S. A.

February 2nd., 1910.

One hundred and eighty days after sight of this First of Exchange (Second unpaid) pay to the order of Ourselves Fourteen hundred and forty eight pounds ten shillings and 5d. Value received and charge the same to account of 100/TSIC bales of cotton.

To Banca Commerciale Italiana (Pay London)

Milan, Italy

Knight, Yancey & Co.

No. 6275
(In margin)
Sale date
1/12
Grade
Type No. 8.

Exhibit 31.

I Knight, Yancey & Co.
Cotton
Decatur, Ala., U. S. A.

Exchange for
£2290 .19 .11

Decatur, Ala., U. S. A.

February 1st., 1910.

Ninety days after sight of this First of Exchange (Second unpaid) pay to the order of Ourselves Twenty two hundred

and ninety pounds nineteen shillings and 11d. Value received and charge the same to account of 150/PSSI bales of cotton.

To Swiss Bankverein,

London, England.

Knight, Yancey & Co.

No. 6270
(In margin)

Sale Date
12/14

Exhibit 32.

1 Knight, Yancey & Co.
Cotton
Decatur, Ala., U. S. A.

Exchange for
£2309 6 11

Decatur Ala., U. S. A.

February 1st., 1910.

Ninety days after sight of this First of Exchange (Second unpaid) pay to the order of Ourselves Twenty three hundred and ninety pounds six shillings and 11d. Value received and charge the same to account of 150/QSMP bales of cotton.

To Swiss Bankverein,

London, England.

Knight, Yancey & Co.

No. 6271
(In margin)

Sale Date
12/14

EXHIBIT 33.

1 Knight, Yancey & Co.
Cotton
Decatur, Ala., U. S. A.

Exchange for
£1411.2.2

Decatur, Ala., U. S. A.

January 20th 1910

Ninety days after sight of this First of Exchange (Second unpaid) pay to the order of ourselves Fourteen hundred and Eleven pounds Two Shillings and 2d. Value received and charge the same to account of 100 TSAG bales of cotton.

To Fred. Huth & Co.

London, England

Knight, Yancey & Co.

No. 6148.
(In margin)
Sale Date
1/13
Grade
Type 8

EXHIBIT 34

1 Knight, Yancey & Co.
Cotton
Decatur, Ala., U. S. A.

Exchange for
£1525 10 0

Decatur, Ala., U. S. A.

January 31st 1910

Ninety days after sight of this First of Exchange (Second unpaid) pay to the order of ourselves Fifteen hundred and twenty-five pounds and Ten Shillings.

Value received and charge the same to account of 100 QNET bales of cotton.

To Credito Italiana (Pay London)

Milan, Italy.

Knight, Yancey & Co.

No. 6252
(In margin)

Sale Date
1/25

Grade
G. M.

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To the introduction of said drafts as evidence plaintiff objected in the case of each of said drafts on the ground that each of them was irrelevant and immaterial evidence and did not show or tend to show any right, title or interest in the cotton the subject matter of this suit, or any part thereof, in the defendants, or either of them, or in the spinners, which objections were by the Court separately overruled, to which action of the Court plaintiff then and there reserved separate exceptions, which exceptions were severally allowed and on which plaintiff still insists.

Defendants thereupon offered in evidence the certificates of insurance referred to in the 5th paragraph of the stipulation as Exhibits 35 to 46 inclusive, all of which certificates are of the same form as Exhibit 35. Exhibit 35 is in words and figures as follows, to-wit:

Exhibit 35.

No. K3055 Certificate of the $7855

Atlantic Mutual Insurance Company
of New York.

Philadelphia Office
226 Walnut Street

New York Office.
51 Wall Street

The revenue laws of Great Britain require that this certificate be stamped within ten days after receipt in the United Kingdom otherwise loss cannot be collected there, such stamps to be at the expense of the assured.

New York, January 21st 1910

On the 21st day of January 1910 Knight, Yancey & Company (Decatur, Ala) caused to be made by this Company on their Policy No. 32511 an endorsement of insurance for Seven thousand eight hundred and fifty five Dollars on one hundred bales of cotton, by the Southern R. R. at and from Decatur, Ala. to New Orleans, La. and thence by La Cotoniera Line to Genoa, Italy.

This certificate represents and takes the place of the Policy, and conveys all the rights of the Original Policy-holder (for the purpose of collecting any loss or claims), as fully as if the property were covered by a Special Policy direct to the holder of this Certificate, and free from any liability for unpaid premiums.

Loss, if any, payable in Sterling to Knight, Yancey & Co., or order, at the office of Morgan, Grenfell & Co., London, England, upon the surrender to them of this Certificate, computed at the rate of Four 90/100 Dollars, Gold, to the Sovereign or Pound Sterling, and when so paid liability under this Insurance is discharged.

Not valid unless countersigned by Mather & Co.

Mather & Co. A. A. Raven, President

(Endorsed) Knight, Yancey & Co.

(In left hand margin)

Proofs of Loss will be authenticated on application by
Union Marine Ins. Co. Ltd. at Liverpool
Frederick Wood, at Havre.
Wambersie & Son, at Rotterdam.
Bleichroder & Co., at Hamburg.
Wm. Arnold (Wendt & Co.) at London.
W. Blaess, at Antwerp
De Vos & Zoon, at Amsterdam.
F. Reck & Co., at Bremen.

(In right hand margin)

Marks
and Numbers.

T S X S

100

Insurance covered up to
Warehouse or Mill.

It is by the assured expressly stipulated in respect to land carriers, that no right of subrogation is, or is to be abrogated or impaired by or through any agreement intended to relieve a carrier from duties or obligations imposed or recognized by the common law, or otherwise.

Each Ten Bales Cotton successive numbers in the order of Invoice, subject to their own particular average, as if separately insured, and when not numbered, then each mark of not less than Ten Bales subject to its own particular average as if separately insured and in case of claim to be so adjusted.

Including the risk of Country Damage.

Including the risk on the quay after discharge from the steamer at port of destination and at and thence until delivery at mill whether at port of discharge or in the interior.

By agreement of counsel Exhibits 36 to 46, both inclusive, are not set out in full. They are on printed forms of the same

kind as Exhibit 35. The material portions thereof are as follows:

EXHIBIT 36 is a certificate of insurance for $7,835.00 dated January 24, 1910, on 100 bales of cotton marked T S S T.

EXHIBIT 37 is a certificate of insurance for $8,490.00, dated February 7, 1910, on 100 bales of cotton marked P S E X.

EXHIBIT 38 is a certificate of insurance for $8,335.00, dated February 8, 1910, on 100 bales of cotton marked S D O N.

EXHIBIT 39 is a certificate of insurance for $8,320.00, dated February 8, 1910, on 100 bales of cotton marked T S C I.

EXHIBIT 40 is a certificate of insurance for $7,790.00, dated February 2, 1910, on 100 bales of cotton marked T S C Z.

EXHIBIT 41 is a certificate of insurance for $7,820.00, dated February 2, 1910, on 100 bales of cotton marked T S P G.

EXHIBIT 42 is a certificate of insurance for $7,800.00 dated February 2, 1910, on 100 bales of cotton marked T S I C.

EXHIBIT 43 is a certificate of insurance for $12,345.00, dated February 1, 1910, on 150 bales of cotton marked P S S I.

EXHIBIT 44 is a certificate of insurance for $12,445.00, dated February 1, 1910, on 150 bales of cotton marked Q S M P.

EXHIBIT 45 is a certificate of insurance for $7,605.00, dated January 20, 1910, on 100 bales of cotton marked T S A G.

EXHIBIT 46 is a certificate of insurance for $8,220.00, dated January 31, 1910, on 100 bales of cotton marked Q N E T.

Exhibits 35 to 46 both inclusive are each indorsed Knight, Yancey & Co.

Defendants thereupon offered in evidence the invoices which are referred to in the fifth paragraph of the stipulation as Exhibits 47 to 58, inclusive, which exhibits are in the words and figures as follows, to-wit:

(INVOICES.)

EXHIBIT 47.

KNIGHT, YANCEY & CO.
C O T T O N NUMBER F 5125
DECATUR, ALA., U.S.A.

ABSTRACT INVOICE OF 100 BALES
Type No. 8 COTTON BOUGHT BY KNIGHT, YANCEY & CO., BY ORDER AND FOR ACCOUNT AND RISK OF Ourselves,

SHIPPED ON BOARD La Contoniera Line,
BOUND TO Genoa,
CONSIGNED TO ORDER. Notify Gino Gavirati,

---

a/c Fratelli Gianoli, Vigerano

| | | | | | |
|---|---|---|---|---|---|
| 100 | T S X S 50467 | | | | |
| 100 | Bales Weighing | 50467 Lbs. | | | |
| | Less 6 per cent | 3028 Lbs. Less in Weight. | | | |
| | | 47439 Lbs | at 7.50 | £1482 | 9 4 |
| | Less Freight on | 50467 Lbs. | at 23 | 24 | 3 7 |
| | | | | 1458 | 5 9 |

BY DRAFT NO. 6151 AT 90 d/s

AGAINST Banca Commerciale Italiana (Pay London) Milan,

INSURANCE Atlantic Mutual Ins. Co. for $7855.
DECATUR, ALA., U.S.A. 1/21/10 (Decatur) .....191....

DATE OF ORDER 1/14/10.
E. & O. E.

EXHIBIT 48.

Form 3

KNIGHT, YANCEY & CO
COTTON NUMBER F 5131
DECATUR, ALA., U.S.A.

ABSTRACT INVOICE OF 100 BALES
Type No. 8 COTTON BOUGHT BY KNIGHT, YANCEY & CO. BY ORDER AND FOR ACCOUNT AND RISK OF Ourselves,

SHIPPED ON BOARD La Cotoniera Line,

BOUND TO Genoa,

CONSIGNED TO ORDER. Notify Gino Gavirati.

---

a/c Fratelli Gianoli Vigerano,

100 T S S T 50323

100 BALES WEIGHING 50323 LBS.

LESS 6 PER CENT 3019 LBS. LESS IN WEIGHT

| | | | |
|---|---|---|---|
| 47304 LBS. | at 7.50 | £1478 | 5 0 |
| LESS FREIGHT ON 50323 LBS. | at 23 | 24 | 2 3 |
| | | 1454 | 2 9 |

BY DRAFT No 6182 AT 90 d/s

AGAINST Banca Commerciale Italiana (Pay London)
Milan,

INSURANCE Atlantic Mutual Ins. Co. for $7835.
DECATUR, ALA., U.S.A. 1/24/10 (Decatur) .....191....

DATE OF ORDER 1/14/10
E. & O. E.

EXHIBIT 49.

KNIGHT, YANCEY CO.
COTTON NUMBER F 5264
DECATUR, ALA., U. S. A.

ABSTRACT INVOICE OF 100 BALES Type 11 COTTON BOUGHT BY KNIGHT, YANCEY & CO., BY ORDER AND FOR ACCOUNT AND RISK OF Ourselves,

SHIPPED ON BOARD La Cotoniera Line,

BOUND TO Genoa,

CONSIGNED TO ORDER. Notify Gino Gavirati,

---

a/c Antonio Bernocchi & Fratelli, Legnous,

100 P S E X 50687

100 BALES WEIGHING 50687 LBS.

LESS 6 PER CENT 3041 LBS. LESS IN WEIGHT.

47647 LBS. at 8.05 £1598 2 6

LESS FREIGHT ON 50687 LBS at 23 24 5 9

1573 16 9

BY DRAFT NO. 6294 AT 180 d/s.

AGAINST Banca Commerciale Italiana (Pay London) Milan,

INSURANCE Atlantic Mutual Ins. Co. for $8490.

DECATUR, ALA., U.S.A. 2/7/10 (Decatur).....191....

DATE OF ORDER 12/28/09.
R. & O. R.

EXHIBIT 50.

KNIGHT, YANCEY & CO. Form 3
C O T T O N NUMBER F 5289
DECATUR, ALA., U. S. A.

ABSTRACT INVOICE OF 100 BALES MIDDLING COTTON BOUGHT BY KNIGHT, YANCEY & CO., BY ORDER AND FOR ACCOUNT AND RISK OF Ourselves,

SHIPPED ON BOARD La Cotoniera Line

BOUND TO Genoa,

CONSIGNED TO ORDER. Notify Gino Gavirati,

---

a/c Manifattura Tosi, Busto - Arsizio,

March/April closed 7.78
100 S D O N 50596 on .15

7.93

100 BALES WEIGHING 50596 LBS.
LESS 6 PER CENT 3035 LBS. LESS IN WEIGHT

47561 LBS. at 7.93 £1571 9 10
LESS FREIGHT ON 50596 LBS. at 23 24 4 10

1547 5 0

BY DRAFT NO 6319 at 180 d/s

AGAINST Banca Commerciale Italiana (Pay London) Milan,

INSURANCE Atlantic Mutual Ins. Co. for $8335.

DECATUR, ALA., U.S.A. 2/7/10 (Selma)

DATE OF ORDER 1/29/10
E. & O. E.

EXHIBIT 51.

KNIGHT, YANCEY & CO. Form 3
COTTON NUMBER F 5290
DECATUR, ALA., U.S.A.

ABSTRACT INVOICE OF 100 BALES
Type No. 8 COTTON BOUGHT BY KNIGHT, YANCEY & CO., BY ORDER AND FOR ACCOUNT AND RISK OF Ourselves,

SHIPPED ON BOARD La Contoniera Line,

BOUND TO Genoa,

CONSIGNED TO ORDER. Notify Gino Gavirati,

---

a/c Manifattura Tosi, Busto - Arsizio,

March/April Closed 7.78
100 T S C I 50498 on 15

7.93

100 BALES WEIGHING 50498 LBS.

LESS 6 PER CENT 3029 LBS. LESS IN WEIGHT.

47469 LBS. at 7.93 £1568 9 1
LESS FREIGHT ON 50498 LBS at 23 24 3 11

1544 5 2

BY DRAFT No. 6320 AT 180 d/s

AGAINST Banca Commerciale Italiana (Pay London) Milan,

INSURANCE Atlantic Mutual Ins. Co. for $8320.

DECATUR, ALA., U.S.A. 2/7/10 (Selma) .....191....

DATE OF ORDER 1/29/10.

E. & O. E.

EXHIBIT 52

KNIGHT, YANCEY & CO
COTTON NUMBER F 5244
DECATUR, ALA., U.S.A.

ABSTRACT INVOICE OF 100 BALES
Type No. 8 COTTON BOUGHT BY KNIGHT, YANCEY & CO., BY ORDER AND FOR ACCOUNT AND RISK OF Ourselves,

SHIPPED ON BOARD La Contoniera Line,

BOUND TO Genoa,

CONSIGNED TO ORDER Notify Gino Gavirati,

---

a/c Cotonificio Furter, Milan,

100 T S C Z 50246

100 BALES WEIGHING 50246 LBS.

LESS 6 PER CENT 3014 LBS. LESS IN WEIGHT.
47232 LBS. at 7.46-½ £1469 2 2
LESS FREIGHT ON 50246 LBS. at 23 24 1 6

1445 0 8

BY DRAFT No. 6274 AT 180 d/s

AGAINST Banca Commerciale Italiana (Pay London) Milan,

INSURANCE Atlantic Mutual Ins. Co. for $7790.

DECATUR, ALA., U.S.A. 2/1/10 (Selma) .....191....

DATE OF ORDER 1/12/10.
E. & O. E.

EXHIBIT 53.

KNIGHT, YANCEY & CO.
COTTON NUMBER F 5246 FORM 3
DECATUR, ALA., U.S.A.

ABSTRACT INVOICE OF 100 BALES
Type No. 8 COTTON BOUGHT BY KNIGHT, YANCEY & CO., By ORDER AND FOR ACCOUNT AND RISK OF Ourselves,

SHIPPED ON BOARD La Contoniera Line,

BOUND TO Genoa,

CONSIGNED TO ORDER. Notify Gino Gavirati,

---

a/c Cotonificio Furter, Milan,

100 T S P G 50460

100 BALES WEIGHING 50460 LBS.
LESS 6 PER CENT 3027 LBS. LESS IN WEIGHT.

| | | | | |
|---|---|---|---|---|
| | 47433 LBS. | at 7.46-½ | £1475 | 7 3 |
| LESS FREIGHT ON 50460 LBS. | | at 23 | 24 | 3 5 |
| | | | 1451 | 3 9 |

BY DRAFT No. 6276 AT 180 d/s

AGAINST Banca Commerciale Italiana (Pay London) Milan.

INSURANCE Atlantic Mutual Ins. Co. for $7820.

DECATUR, ALA., U.S.A. 2/1/10 (SELMA) .....191....

DATE OF ORDER 1/12/10.
E. & O. E.

EXHIBIT 54.

KNIGHT, YANCEY & CO FORM 3
COTTON NUMBER F 5245
DECATUR, ALA., U.S.A.

ABSTRACT INVOICE OF 100 BALES
Type No. 8 COTTON BOUGHT BY KNIGHT YANCEY & CO., BY ORDER AND FOR ACCOUNT AND RISK OF Ourselves,

SHIPPED ON BOARD La Cotoniera Line,

BOUND TO Genoa,

CONSIGNED TO ORDER. Notify Gino Gavirati,

---

a/c Cotonificio Furter, Milan,

100 T S I C 50 368

100 BALES WEIGHING 50368 LBS.

LESS 6 PER CENT 3022 LBS. LESS IN WEIGHT.

| | | | | |
|---|---|---|---|---|
| | 47346 LBS. | at 7.46-½ | £1472 | 13 1 |
| LESS FREIGHT ON | 50368 LBS. | at 23 | 24 | 2 8 |
| | | | 1448 | 10 5 |

BY DRAFT NO. 6275 At 180 d/s

AGAINST Banca Commerciale Italiana (Pay London) Milan,

INSURANCE Atlantic Mutual Ins. Co. for $7800.

DECATUR, ALA., U.S.A. 2/1/10 (Selma) .....191....

DATE OF ORDER 1/12/10.

E. & O. E.

EXHIBIT 55.

KNIGHT, YANCEY & CO. FORM 3
COTTON NUMBER F5240
DECATUR, ALA., U.S.A. Fully Good Mid. Light Tinges

ABSTRACT INVOICE OF 150 Bales COTTON BOUGHT BY KNIGHT, YANCEY & CO., BY ORDER AND FOR ACCOUNT AND RISK OF Ourselves,

SHIPPED ON BOARD La Cotoniera Line,

BOUND TO Genoa,

CONSIGNED TO ORDER. Notify Giro Gavirati,

---

a/c Cotonificio Cantoni, Milan.

150 PSSI 75693

150 BALES WEIGHING 75693 LBS.

LESS 6 PER CENT 4541 LBS. LESS IN WEIGHT.

| | | | | |
|---|---|---|---|---|
| | 71152 LBS. | at 7.85 | £2327 | 5 3 |
| LESS FREIGHT ON 75693 | LBS. at | 23 | 36 | 5 4 |
| | | | 2290 | 19 11 |

BY DRAFT No. 6270 AT 90 d/s

AGAINST Swiss Bankverein,
London,

INSURANCE Atlantic Mutual Ins. Co. for $12345.

DECATUR, ALA., U.S.A. 2/1/10 (DECATUR) .....191....

DATE OF ORDER 12/14/09

E. & O. E.

EXHIBIT 56.

KNIGHT, YANCEY & CO FORM 3
COTTON NUMBER F 5241
DECATUR, ALA., U.S.A. Good Mid. Light Tinges.

ABSTRACT INVOICE OF 150 BALES COTTON BOUGHT BY KNIGHT, YANCEY & CO., BY ORDER AND FOR ACCOUNT AND RISK OF Ourselves,

SHIPPED ON BOARD La Cotoniera Line,

BOUND TO Genoa,

CONSIGNED TO ORDER. Notify Gino Gavirati.

---

a/c Cotonificio Cantoni, Milan.

150 Q S M P 76300

150 BALES WEIGHING 76300 LBS.

LESS 6 PER CENT 4578 LBS. LESS IN WEIGHT.

71722 LBS. at 7.85 £2345 18 1
LESS FREIGHT ON 76300 LBS. at 23 36 11 2

BY DRAFT No. 6271 AT 90 d/s

AGAINST Swiss Bankverein,
London,

INSURANCE Atlantic Mutual Ins. Co., for $12445.

DECATUR, ALA., U.S.A. 2/1/10 (DECATUR) .....191....

DATE OF ORDER 12/14/09

E. & O. E.

EXHIBIT 57.

KNIGHT, YANCEY & CO
COTTON
DECATUR, ALA., U. S. A.

FORM 3

NUMBER F 5111

ABSTRACT INVOICE OF 100 BALES Type No. 3 COTTON BOUGHT BY KNIGHT, YANCEY & CO., BY ORDER AND FOR ACCOUNT AND RISK OF Ourselves,

SHIPPED ON BOARD La Cotoniera Line.

BOUND TO Genoa,

CONSIGNED TO ORDER. Notify Gino Gavirati,

---

A/c Cotonificio Cantoni, Milan,

90 d/s Fred. Huth & Co.,

March/April closed 7.33

100 T S A G 49986

100 BALES WEIGHING 49988 LBS.
LESS 6 PER CENT 2999 LBS. LESS IN WEIGHT.

| | | | | |
|---|---|---|---|---|
| | 46987 LBS. | at 7.33 | £1435 | 1 2 |
| LESS FREIGHT ON 49986 | LBS. at | 23 | 23 | 19 0 |
| | | | 1411 | 2 2 |

BY DRAFT No. 6148 AT 90 d/s

AGAINST Fred. Huth & Co.,
London,

INSURANCE Atlantic Mutual Ins. Co. for $7605.

DECATUR, ALA, U.S.A. (Decatur( (1/20/10 .....191....

DATE OF ORDER 1/13/10.
E. & O. E.

EXHIBIT 58

KNIGHT, YANCEY & CO
COTTON
DECATUR, ALA., U.S.A.

FORM 3

NUMBER F 5223

ABSTRACT INVOICE OF 100 BALES Good Middling Cotton BOUGHT BY KNIGHT, YANCEY & CO., BY ORDER AND FOR ACCOUNT AND RISK OF Ourselves,

SHIPPED ON BOARD La Contoniera Line,

BOUND TO Genoa,

CONSIGNED TO ORDER. Notify Gino Gavirati,

---

a/c Cotonificio Cantoni, Milan.

100 Q N E T 50862

100 BALES WEIGHING 50862 LBS.

LESS 6 PER CENT 3051 LBS. LESS IN WEIGHT

47811 LBS. at 7.78 £1549 17 5

LESS FREIGHT ON 50862 LBS. at 23 24 7 5

1525 10 0

BY DRAFT No. 6252 AT 90 d/s

AGAINST Credito Italiana (PAY London) Milan,

INSURANCE Atlantic Mutual Ins. Co. for $8220.

DECATUR, ALA., U.S.A. 1/31/10 (Decatur) .....191....

DATE OF ORDER 1/25/10.

E. & O. E.

Thereupon the plaintiff offered in evidence a true copy of the record of the proceedings including the bond given under the decrees refrred to in the fifteenth paragraph of the stipulation, which record, including said bond, is in words and figures as follows, to-wit:

## RECORD OF PROCEEDINGS INCLUDING BOND.

### TO THE HONORABLE RUFUS E. FOSTER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA:

The petition of C. E. Frost and W. S. Lovell, Receivers of Knight, Yancey & Company, bankrupt, with respect represents:

That your petitioners were appointed Receivers of Knight, Yancey & Company, bankrupt, by the District Court of the United States for the Northern District of Alabama, as will appear by the certified copy of a decree hereto annexed and made part hereof; that your petitioners have qualified as such and are authorized and empowered to act in the premises.

That, as will appear from a certified copy of the decree hereto annexed and made part hereof, your petitioners are authorized to take charge of the assets of the bankrupt firm of Knight, Yancey & Company and to hold and keep same subject to the further orders of said Court, and your petitioners are further authorized and empowered to bring and maintain such actions at law and in equity as may be necessary to fully carry out their powers and duties as set forth in said decree, all of which is annexed hereto and made part hereof as fully and to the same extent as if set forth at length herein.

Your petitioners aver that there are now lying at the port of Chalmette in the Parish of St. Bernard in this City, or in the possession of certain railroads or steamship companies at the port of New Orleans, or on the steamship Ingelfingen, and within the jurisdiction of this Court certain cotton more particularly described on the list which is herto annexed, made part hereof and hereby referred to for greater certainty and particularity.

Your petitioners aver that said cotton is moving to the destination referred to on the said annexed document and will, unless restrained, seized or arrested, be shipped to its said destination, beyond the jurisdiction of this Court.

Your petitioners are informed and verily believe and are able to aver and charge that certain persons residing in Italy and in Bremen hold forged, false and spurious bills of lading upon which they will seek to obtain possession of said cotton at said ports of destination, and that the original bills of lading for said cotton have been either destroyed or made away with and are not now outstanding or in the bona fide possession of any third persons.

Your petitioners aver that if said cotton is shipped and permitted to be landed in said foreign jurisdictions, your petitioners, or such trustee as may be elected to succeed them, and the creditors generally of the bankrupt estate will be deprived of their right in and to said cotton and assets and that said cotton may be seized in said foreign jurisdiction and subjected to the claims and demands of foreign creditors to the prejudice of the creditors of your petitioners and the bankrupt estate and the creditors generally of the firm of Knight, Yancey & Company.

Your petitioners aver that said cotton is now in the possession of the master of the SS Ingelfingen or the New Orleans Terminal Company; that the said cotton was recently detained by the carriers in whose possession it was, but that subsequently at the instance of said foreign holders of said spurious bills of lading, and possibly upon their guarantee, and particularly with a view that said cotton may be shipped beyond the jurisdiction of this Court and of the courts of the United States, the release of said cotton was procured.

Your petitioners aver that in view of the fact that the original bills of lading for said cotton are not outstanding, the legal title to said cotton is in your petitioners and that any attempt to ship said cotton to said foreign countries and beyond the jurisdiction of this Court will result in depriving your petitioners and the bankrupt estate of said cotton as an asset of said estate and does and will constitute an unlawful preference within the meaning and intendment of the bankrupt Act of the

United States in favor of said foreign holders of said spurious bills of lading, whose names are to your petitioners unknown.

That your petitioners have no adequate remedy at law, and to the end that this Court may give them such relief as a Court of Equity alone may grant, your petitioners pray that in due course and after hearing an injunction pendente lite may issue, or that in the alternative this Court may according to the act of Congress of the United States known as the bankruptcy Act and the rules and practice thereunder and of this Court as a Court of Equity, order the Marshal for the Eastern District of Louisiana to seize and take into his possession the cotton hereinabove described, or any part thereof as may be found within this District; and to the end that said defendants, the master of the SS Ingelfingen, its owners and agents and said New Orleans Terminal Company, and each of them, may show cause, if any they have or can, why the relief as herein prayed for may not be granted, may it please your Honors to grant unto your petitioners a writ of subpoena addressed to said defendants and each of them, commanding them, and each of them, to appear in this Court on a day fixed and to answer hereto, but not under oath, said oath being expressly waived, and to abide the judgment of this Court in the premises:

And petitioners pray for all general and equitable relief as the nature of this case may require.

Saunders, Dufour & Dufour,
Solicitors for Petitioners.

UNITED STATES OF AMERICA
STATE OF LOUISIANA
PARISH OF ORLEANS.

H. GENERES DUFOUR, being duly sworn deposes and says:

That he is a member of the firm of Saunders, Dufour & Dufour, attorneys at law in this City;

That said firm is counsel for the Receivers of Knight, Yancey & Company; that petitioners are without the State; he is authorized to make the affidavit;

That he has read the foregoing petition and that the facts and allegations therein contained are true to the best of his knowledge, information and belief, so help him God.

Sworn to and subscribed before me
this 3rd day of May, 1910.

H. G. Dufour.

H. J. Carter
U. S. Commissioner.

United States District Court, Eastern Dist. of Louisiana.

C. E. FROST and W. S. LOVELL, Receivers of Knight, Yancey & Company, bankrupt.

vs. No. 14,315.

MASTER and OWNERS, etc., of S. S. INGELFINGEN, et al.

Order.

The foregoing petition and affidavit being considered,

IT IS ORDERED that a restraining order do issue commanding the defendants in said petition named, the Master of the S/S Ingel & the N. O. Terminal Co, and each of them, from moving, forwarding, or in any manner disposing of the cotton referred to in the foregoing petition, and let said defendants, and each of them, show cause on the 7th., day of May, 1910, why a writ of injunction pendente lite may not issue herein as prayed for.
May 3, 1910.

(Signed) Rufus E. Foster,

Judge.

**UNITED STATES OF AMERICA.**
**THE PRESIDENT OF THE UNITED STATES,**

**TO THE MARSHAL OF THE EASTERN DISTRICT OF LOUISIANA—GREETING:**

You are hereby Commanded to summon THE MASTER OF THE STEAMSHIP "INGELFINGEN," Its Agents, or Owners, to appear before the Honorable the DISTRICT COURT of the United States of America for the EASTERN DISTRICT OF LOUISIANA to be holden on the first Monday of June, 1910, then and there to answer a Petition filed against them, and others, wherein C. E. FROST and W. S. LOVELL, Receivers of KNIGHT, YANCEY & COMPANY, bankrupts, are Petitioners, and said Master of the Steamship "INGELFINGEN," Its agents or Owners, and the New Orleans Terminal Company are Defendants.

HEREIN FAIL NOT, and have you then and there this writ, with your endorsement thereon, how you have executed the same.

WITNESS, the Honorable RUFUS E. FOSTER, Judge of the DISTRICT COURT OF UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA, at New Orleans, this third day of May in the year of our Lord one thousand nine hundred and ten, and 134th, year of American Independence.

Frank H. Mortimer,
Clerk.

By....,
Deputy Clerk.

The defendants are hereby notified that they are required to enter their appearance in the Clerk's Office of the United States

District Court, on or before the first Monday of June 1910, otherwise the petition may be taken pro confesso.

Frank H. Mortimer,
Clerk.

By.....,
Deputy Clerk.

UNITED STATES OF AMERICA.
DISTRICT COURT OF THE UNITED STATES,
Eastern District of Louisiana, New Orleans Division.

C. E. FROST and W. S. LOVELL Receivers of Knight, Yancey & Company, bankrupt.

vs. No. 14,215.

Master and Owners, etc., of S/S INGELFINGEN, et al.

THE PRESIDENT OF THE UNITED STATES,

TO the Master, of the Steamship Ingelfingen, its Agents or Owners, and the New Orleans Terminal Co. GREETING:

WHEREAS, it has been represented unto us in our said District Court on the part of C. E. Frost and W. S. Lovell, Receivers of Knight, Yancey & Company, bankrupt, in a petition lately exhibited against you and each of you touching certain matters and things therein set forth; and, whereas, the Honorable RUFUS E. FOSTER, Judge of our said Court, upon due consideration thereof, has made and allowed an order in said cause, whereby you and each of you are required to show cause on the 7th day of May, 1910, at 11 A. M., why an injunction should not issue as prayed for in said petition; And, Whereas, the said Judge has granted and allowed an order restraining you and each of you immediately and forthwith and during the pendency of said motion for an injunction to the full extent and effect as prayed for in said petition.

NOW, therefore, in consideration of the premises and of the allegations in said petition contained, you, the said Master of the Steamship Ingelfingen, its Agents or Owners and the New Orleans Terminal Co. your agents, attorneys and servants, and each of you are hereby commanded and strictly enjoined under the penalty of the law, that you and each of you absolutely refrain and desist from moving, forwarding, or in any manner disposing of the cotton referred to in the petition on file in this cause.

And that you the said Master of the Steamship Ingelfingen, and the New Orleans Terminal Company, your agents, attorneys and servants, and each of you, remain so inhibited and restrained until the further order of our said Court in the premises.

WITNESS, the Honorable RUFUS E. FOSTER, Judge of the District Court of the United States, this 3rd day of May in the year of our Lord one thousand nine hundred and ten.

Frank H. Mortimer,
Clerk.

United States District Court, Eastern District of Louisiana.

C. E. FROST AND W. S. LOVELL, Receivers of Knight, Yancey & Company, Bankrupts, etc.

vs. No. 14,125.

MASTERS and OWNERS, etc. of S/S INGELFINGEN, et als.

N O W comes Theo. Ruhne, Master of the German Steamship "Ingelfingen," and for the exception to the petition herein served says: That the petitioners C. E. Frost and W. S. Lovell, Receivers of Knight, Yancey & Company are without right, power or capacity to institute and prosecute this action, or to stand in judgment therein, and that the Court is without jurisdiction ratione materiae.

WHEREFORE, exceptor prays that this exception may be maintained and the petition dismissed, and for such other and further relief as the case requires.

(Signed) Wheeler, Cortis & Haight,

(Signed) Dart, Kernan & Dart,
Solicitors for Defendant.

United States District Court, Eastern District of Louisiana.

C. E. FROST and W. S. LOVELL, Receivers of Knight, Yancey & Co., Bankrupts.

vs. No. 14,125.

The Master of the S/S Ingelfingen, et als.

To The HONORABLE RUFUS E. FOSTER, Judge, of the District Court of the United States for the Eastern District of Louisiana:

Now comes Th. Ruhne, Master of the German Steamship Ingelfingen, defendant herein, and bailee of the cargo of cotton now laden on said Steamship and for answer to the petition of C. E. Frost and W. S. Lovell, receivers of Knight, Yancey & Company, bankrupt, herein filed.

RESPECTFULLY ALLEGES AS FOLLOWS:

First: This defendant is the Master of the German Steamship Ingelfingen, a vessel of 2193 tons net Register, Now lying in the port of New Orleans, bound to Genoa, Italy, and due to sail immediately upon the completion of the loading of her cargo at this port, to wit, on or about Saturday, May 7th, 1910, and this defendant is bailee of the cargo of cotton herein mentioned, now laden on board said vessel.

Second: This defendant denies that the petitioners are authorized or empowered to bring or maintain this action and that they have any standing therein in this Court.

Third: This defendant is informed and believes, and therefore charges that the firm of Knight, Yancey & Company has for a long time past been regularly engaged under certain contracts in the sale of cotton to various Italians Purchasers, for whom Gino Givarati, hereinafter, mentioned, was and is agent at Genoa.

The course of business during said time has been as follows: The cotton was shipped by Knight, Yancey & Company from Decatur, Alabama, Selma, Alabama, or other interior points, under a through bill of lading issued by the Southern Railway Comapny and reading over said Railroad to New Orleans, and thence via La Cotoniera Line of Steamships, to which the Ingelfingen belongs, to Genoa, Italy. Freight on said shipments has always been payable by the purchasers, and the shipments have been consigned as follows: "Shipper's order, Genoa, Italy, party to be notified, Gino Gavirati, Genoa, Italy." The said bill of lading was thereupon attached by said Knight, Yancey & Company to a draft for the price of the cotton, and presented, with the said draft and the proper policy of insurance, to a bank, which discounted said draft, and transmitted the same, together with said bill of lading and policy of insurance, to the said Italian purchasers, who thereupon accepted and paid said draft, obtained said bill of lading, duly endorsed, to them and with it obtained the cotton from La Cotoniera Line upon its arrival at Genoa.

Fourth: On information and belief, said Knight, Yancey & Company, in or about the month of February, 1910, presented for discount to their bank, drafts attached to certain bills of lading in the form already mentioned, covering or purporting to cover Fourteen Hundred (1400-bales of cotton, marked as follows, and shipped from the points indicated below:

| | | | | |
|---|---|---|---|---|
| Decatur, | Ala, | 150 | Bales | Q S M P |
| " | " | 100 | " | Q N E T |
| " | " | 100 | " | T S X S |
| " | " | 150 | " | P S S I |
| " | " | 100 | " | T S S T |
| " | " | 100 | " | T S A G |
| " | " | 100 | " | P S E X |
| " | " | 100 | " | T S L L |

| | | | | |
|---|---|---|---|---|
| Selma, | Ala. | 100 | Bales | P S C Z |
| " | " | 100 | " | S D O N |
| " | " | 100 | " | T S C I |
| " | " | 100 | " | T S I C |
| " | " | 100 | " | T S P G |

The bank duly discounted said drafts which were for the regular price of said cotton, and the drafts with said bills of lading, duly endorsed as aforesaid, were presented to the Italian purchasers of said cotton at Genoa for acceptance, and were by them accepted and paid and they now hold said bills of lading and are the true owners of said goods. Said bills of lading are the same as those mentioned in the petition herein and it is therein alleged that they are forgeries and that no cotton had in fact been shipped by Knight, Yancey & Company at the time said bills of lading were sold by them as aforesaid. Said purchasers acquired said bills of lading in the regular course of their business in ignorance of the forgeries; if any; as already stated, for value; and prior to the filing of the petition in bankruptcy herein.

Fifth: On information and belief, thereafter and on the third day of March 1910, and on the 1st, 6th, 7th and 11th days of April 1910, prior to the filing of the petition in bankruptcy herein, said Knight, Yancey & Company having actually purchased the cotton called for by the said bills of lading marked it with the marks above set forth and shipped it under bills of lading of the same form and terms as the said alleged forged bills of lading, from the points of shipment set forth above to the said Italian purchasers at Genoa, routed over the said Southern Railway to New Orleans, and then via La Cotoniera Line to Genoa.

The bills of lading issued for this cotton by the Southern Railway are the same as stated in the petition to have been "either destroyed or made away with," and to be not "in the bona fide possession of any third persons."

Sixth: The Southern Railway duly transported said cotton over its road to New Orleans, and delivered the same without taking or receiving any guaranty from La Cotoniera Line, and to the Steamship Ingelfingen in pursuance of its contract under

said bills of lading. Of said cotton, eighty nine (89) bales marked T S L L were duly loaded on board the Steamship Sicania of The Pierce line, which sailed from New Orleans for Genoa, on April 13th, 1910. The remaining Thirteen Hundred Eleven bales were loaded on board the Steamship Ingelfingen of La Cotoniera line, now in this part and about to sail for Genoa, under and in pursuance of said bills of lading. Said cotton is now on board of said S/S Ingelfingen, in the port of New Orleans, and was loaded and stowed on her prior to the service of process herein.

Seventh: By reason of the premises, said cotton, which is that mentioned in the petition herein, is, as defendant is advised, believes and now charges, the property of said Italian purchasers, and is rightfully in possession of this defendant, as bailee as aforesaid.

Eighth: This defendant denies that the petitioners, the firm of Knight, Yancey & Company, or the creditors of Knight, Yancey & Company, or anyone representing them, have had or at any time since the shipment of the said goods, have had any color or right, title, or interest in or to said 1311 bales of cotton or any of them.

Ninth: The defendant alleges that, if it be true, as alleged in the petition, that the bills of lading now held by said purchasers are forged and spurious, as to which this defendant has no personal knowledge, said forgery was committed by said Knight, Yancey & Company, and that, whether said bills of lading be forged or not, the said cotton now on board of said Steamship was delivered by Knight, Yancey & Company to the Southern Railway and received by it and by it transported to New Orleans and delivered to this defendant, as the cotton to be carried and delivered by it under the through bills of lading actually issued by said Southern Railway as aforesaid which bills of lading are admittedly genuine and are duplicates of said alleged forged bills of lading, and which, as stated in the petition are not now outstanding.

Tenth: This defendant further alleges that Knight, Yancey & Company have long prior to the filing of the petition in bankruptcy herein, been paid for said cotton now on board the S/S Ingelfingen, and that the allotment and apportionment

of the same by Knight, Yancey & Company to cover the bills of lading now held by said purchasers was in good faith at a time when they were not known to be insolvent; that the said purchasers were at no time informed that said bills of lading were spurious, and neither they nor Gino Gavirati, their agent, had any reason to so believe or suspect, or to believe or suspect that there was any intent on the part of Knight, Yancey & Company to prefer them or give them any advantage over other creditors; that it is not true in fact that any preference was ever given to them; and that on the contrary neither they nor their said agents, ever knew that said cotton was shipped to them otherwise than under the bills of lading brought and now held by them as aforesaid, or otherwise than in pursuance of their said contracts with Knight, Yancey & Company, and in the regular course of business.

Eleventh: This defendant further alleges on information and belief, that for many months past, Knight, Yancey & Company have been issuing forged through bills of lading purporting to cover actual shipments of cotton, marked as set forth in said bills of lading, and have been drawing on said purchasers, and on other Italian purchasers, against said forged bills of lading, and that said purchaser have been honoring such drafts in ignorance of said forgery, and that said Knight, Yancey & Company have thereafter been purchasing or shipping cotton corresponding in quantity and mark to that described in said forged bills of lading and shipping it to cover the same to the said purchasers of said bills of lading; said shipments being made under through bills of lading identical with the forged bills; that Knight, Yancey & Company have been destroying or suppressing said genuine bills of lading and treating the forged bills of lading as the genuine ones; and that said Italian purchasers have been obtaining the cotton so shipped by means of the forged bills of lading in ignorance of such forgery, and believing them to be genuine; and that it was not until after the filing of the petition in bankruptcy herein, if ever, that said Italian purchasers or their said agents knew or suspected that said bills of lading were forged.

Twelfth: This defendant is as foresaid, the bailee of said cotton under regular true bills of lading duly and properly is-

sued binding him and said S/S Ingelfingen and La Cotoniera Line to carry said cotton forward to Genoa and deliver it to said purchasers, the true owners thereof. As such bailee and under said contracts, this defendant is entitled to carry said cotton and thereby earn his agreed freight thereon, and is entitled and obliged to protect and defend said cotton, especially in the absence of said owners who are in Italy, against the claims of these petitioners and of all other persons claiming the same, and having no title or right of possession thereto. This defendant as Master of said Steamship has duly issued his Master's receipt for said cotton.

Thirteenth: This defendant has a lien upon said cotton for said agreed price or for dead freight; and also for the costs of loading and discharging the same, and for detention of said Steamship, amounting in all, approximately to the sum of Four Thousand Dollars ($4000). If said cotton is not now transported, further charges will accrue for the storage, etc. thereof.

Fourteenth: This defendant, denies that the petitioners have no adequate remedy at law and that the equitable intervention of this Court is necessary; and further denies that the transportation of said cotton to its said owners is or can be a preference under the bankruptcy Act referred to in the petition herein.

WHEREFORE, the defendant prays that the petition herein may be dismissed with costs, and that the restraining order heretofore granted herein may be vacated and set aside, and that he may have such other and further relief as in equity he may be entitled to receive.

Wheeler, Cortis & Haight,
Dart, Kernan & Dart,
Solicitors for Defendant.

United States of America
State of Louisiana SS.
Parish of Orleans.

Th. Ruhne, being duly sworn, deposes and says: That he is the Master of the S/S Ingelfingen and a defendant herein; that

he has read the foregoing answer, and that the facts and allegations, therein contained, are true to the best of his knowledge, information and belief, SO HELP HIM GOD.

Subscribed to and sworn to
before me, this 5th day of May 1910 Th. Ruhne

Frank H. Mortimer
UNITED STATES COMMISSIONER.
(seal)

TO THE HONORABLE RUFUS E. FOSTER, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA:-

Now comes the Richard Meyer Company, agent for the S/S Ingelfingen, a defendant herein, and for answer to the petition of C. E. Frost and W. S. Lovell, Receivers of Knight, Yancey & Company, Bankrupts, herein filed,

Respectfully alleges as follows:

First: This defendant at all times herein mentioned was and now is a corporation organized under the laws of the State of Louisiana, and the agent at New Orleans of the Steamship Ingelfingen and of La Cotoniera Lines, to which said Steamship belongs.

Second: This defendant hereby accepts and adopts as its own the answer of the defendant Th. Ruhne Master of S. S. Ingelfingen to said petition, and the allegations thereof, as fully as if herein set forth at length, and hereby joins in the same.

WHEREFORE said defendant prays that the petition herein may be dismissed with costs, and that the restraining order heretofore granted herein may be vacated and set aside, and that it may have such other and further relief as in equity it may be entitled to receive.

Wheeler, Cortis & Haight,
Dart, Kernan & Dart,
Solicitors for Defendant.

UNITED STATES OF AMERICA :
STATE OF LOUISIANA :SS
PARISH OF ORLEANS :

Albert R. LaFonta, being duly sworn, deposes and says: That he is acting manager of the Richard Meyer Company a defendant herein; that he has read the foregoing answer and the answer of the Master of the S. S. Ingelfingen herein; and that the facts and allegations therein contained are true, to the best of his knowledge, information and belief, so help him God.

Subscribed and sworn to before
me this 5th day of May, 1910

A. R. Lafonta.

Frank H. Mortimer,
UNITED STATES COMMISSIONER.
(seal)

United States District Court, Eastern District of Louisiana.

C. E. FROST and W. S. LOVELL, Receivers, et al.

vs. No. 14,215.

THE MASTER OF S/S "INGELFINGEN" et al.

New Orleans, La., May 6th, 1910.

Court met pursuant to adjournment;

Present: Hon. Rufus E. Foster, Judge.

This case came on at this term to be heard.

Present:

Messrs. Saunders, Dufour & Dufour and A. Benners, for the Receivers, petitioners.

Messrs. Wheeler, Cortis & Haight, and Dart, Kernan & Dart, Th. Ruhne, Master of the S/S "Ingelfingen" and the Richard Meyer Co., Agents of said ship.

Whereupon the respondent, Th. Ruhne, Master of the S/S "Ingelfingen," filed certain exceptions, which, after argument by Counsel, were overruled by the Court. Whereupon the respondents Th. Ruhne and the Richard Meyer Co., Master and agents of the Steamship "Ingelfingen," respectively, filed their respective answers.

Upon considering the petition and the answers of the respondents, and after hearing the argument of Counsel,

IT IS ORDERED, ADJUDGED AND DECREED that an injunction pendente lite do issue herein against Th. Ruhne, Master of the Steamship "Ingelfingen" and the Richard Meyer Co., Agents thereof, enjoining, restraining and prohibiting the parties aforesaid, and each of them, from moving out of or removing from the jurisdiction of this Court, the 1311 bales of cotton more particularly referred to and described in the pleadings herein, upon the condition that the Receivers give bond in the sum of $10,000.00, with good and solvent surety, payable to the Clerk of this Court, for the use and benefit of whom it may concern, said bond to be conditioned for the payment of any loss, damage or injury suffered in consequence of the issuance of this injunction, and the restraining order, and legally chargeable to the bankrupt estate, or to the Receivers or Trustee, the said bond to be approved by the Judge of this Court. In the meantime the restraining order heretofore issued herein to remain in force.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the respondents, the Master of the S. S. "Ingelfingen," and the Richard Meyer Co., Agents of said Ship, may move said cotton from the jurisdiction of this Court, notwithstanding the foregoing provisions of this order, provided said respondents, or either of them, shall pay into the registry of this Court the value of said cotton, or furnish a bond with surety acceptable to this Court for the present cash value of the cotton referred to in the pleadings. Said bond shall be conditioned upon the payment of the principal sum thereof, or such part thereof as the Court may direct, by the surety thereon to the Receivers of Knight, Yancey & Company, in bankruptcy, or to such trustee as may hereafter be elected or appointed, if, in a suit or action at law or in equity that may or shall here-

after be brought in the Circuit or District Court of the United States for the Eastern District of Louisiana, by the Receivers in bankruptcy of Knight, Yancey & Company, or the trustee or trustee in bankruptcy of said Knight, Yancey & Company, against the surety on said bond, it shall be adjudged that the said receivers or said trustee or trustees of said Knight, Yancey & Company, or the bankrupt estate of Knight, Yancey & Company, have the right, title or interest to said cotton, or any part thereof.

IS IT FURTHER ORDERED, ADJUDGED AND DECREED that the rights of the Steamship "Ingelfingen" her owners, agents and charterers for such damage as they may have sustained or may sustain occasioned by her detention in port, or for any other damage growing out of the issuance of the temporary restraining order or of this injunction, are reserved as against the receivers and trustee of the bankrupt estate.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that the Court retains the case for such further proceedings, as in its judgment may be proper.

May 6, 1910. (signed) Rufus E. Foster.

Judge.

Approved as to form.

(signed) Saunders, Dufour & Dufour.
Attys. for Plaintiff.

" WHEELER, CORTIS & HAIGHT.
Attys. for Respondents.

CLERK'S OFFICE:

I, FRANK H. MORTIMER, Clerk of the District Court of the United States for the Eastern District of Louisiana, do hereby certify the above and foregoing to be a true and correct copy

of the original on file and of record in my office in the above entitled and numbered cause.

WITNESS my hand, and the seal of the said Court, at New Orleans, La., this 10th, day of May A. D., 1910.

(Seal)

Frank H. Mortimer,
Clerk.

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United States of America, District Court of the United States, Eastern District of Louisiana.

C. E. FROST AND E. S. LOVELL, RECEIVERS OF KNIGHT, YANCEY & CO., BANKRUPTS.

versus No. 14,215

MASTER OWNERS ETC. OF STEAMSHIP "INGELFINGEN" ET ALS, AND NEW ORLEANS TERMINAL COMPANY.

The President of the United States of America,

To Th. Ruhne, Master of Steamship "INGELFINGEN" and the Richard Meyer Co., Agents thereof, GREETING;

WHEREAS, it has been represented unto us in our said District Court on the part of C. E. FROST and E. S. LOVELL, Receivers of Knight, Yancey & Company Bankrupts, in a certain petition lately exhibited against you and each of you touching certain matters and things therein set forth

Now, therefore, in consideration of the premises and of the allegations in said petition contained, you, the said Th. Ruhne, Master of Steamship "INGELFINGEN," and the Richard Meyer Co., Agents, your attorneys and each of you, are hereby

commanded and strictly enjoined, under the penalty of the law, that you absolutely refrain and desist from moving, forwarding, or in any manner disposing of the cotton referred to in the petition on file in this cause, and that you remain so inhibited and enjoined until the further order of our said Court in the premises.

Witness, the Honorable Rufus E. Foster, Judge of said Court, at the City of New Orleans, this 9th
(SEAL) day of May in the year of our Lord, 1910.

Frank H Mortimer,
Clerk.

KNOW ALL MEN BY THESE PRESENTS: That we, C. E. FROST and W. S. LOVELL, Receivers in Bankruptcy of Knight, Yancey & Company, Bankrupt, appointed by and acting under authority of the District Court of the United States for Northern District of Alabama, as PRINCIPALS, and the NATIONAL SURETY COMPANY OF NEW YORK, a corporation created by and under the laws of the State of New York and authorized to do business in the State of Louisiana, as SURETY, are held and firmly bound unto FRANK H. MORTIMER, Clerk of the District Court of the United States for the Eastern District of Louisiana and his successors in office, for the use and benefit of whom it may concern, in the full and true sum of Ten Thousand Dollars ($10,000.00) lawful money of the United States of America, for the payment whereof we bind ourselves, our successors and assigns firmly by these presents.

THUS DONE AND SIGNED in the City of New Orleans, State of Louisiana, on this 9th day of May, 1910.

NOW THEREFORE

THE CONDITION OF THE ABOVE AND FOREGOING OBLIGATION IS SUCH THAT

Whereas said C. E. Frost and W. S. Lovell, Receivers of Knight, Yancey & Company, Bankrupt, did, in the proceedings 14,215 of the docket of the District Court of the United States for the Eastern District of Louisiana, entitled "C. E. Frost and

W. S. Lovell, Receivers, vs. the Master of the Steamship Ingelfingen, et als," apply for and obtain a restraining order and subsequently an injunction against Theodore Rugbe, Master of the Steamship Ingelfingen,, and Richard Meyer & Company, agents of said Steamship, enjoining, restraining and prohibiting them, and each of them from removing or causing to be removed from or out of the jurisdiction of this Court 1311 certain bales of cotton more particularly described in the pleadings in said suit upon condition that said Receivers should furnish bond.

NOW THEREFORE, if the said Receivers of Knight, Yancey & Company, Bankrupt, or the trustee or trustees of said Knight, Yancey & Company, Bankrupt, or the said Bankrupt Estate of Knight, Yancey & Company shall pay all loss, damage or injury which may be suffered in consequence of the insurance of said injunction or restraining order, and which may be legally chargeable to said Receivers, or said trustee or trustees or said bankrupt estate, then this obligation shall be null and void, else remain in full force and effect.

(Signed) C. E. Frost & W. S. Lovell,
Receivers of Knight, Yancey & Co.
By Saunders, Dufour & Dufour,
Attys.

" National Surety Company
By. Frank A. Daniels,
Res Vice President.

(SEAL) Wm. A. Tourtarel.
Res. Asst-Secretary.

Approved.

(SIGNED) Rufus E. Foster.
Judge.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION.

C. E. Frost and W. S. Lovell, Receivers of Knight, Yancey and Company, Bankrupts.

versus No. 14,215

Master, Owners, Etc., of Steamship "Ingelfingen" et als and New Orleans Terminal Company.

## BOND OF MASTER OF STEAMSHIP "INGELFINGEN"

FILED MAY 11TH, 1910.

KNOW ALL MEN BY THESE PRESENTS, That we, Th. Ruhne, Master of S/S Ingelfingen, and Isidore Newman and Son, New Orleans, La., doing business as Isidore Newman & Son, are held and firmly bound unto C. E. Frost and W. S. Lovell, as Receivers in Bankruptcy of the estate of Knight, Yancey & Company, and unto such Trustee or Trustees in bankruptcy of said estate as may hereafter be elected or appointed, and unto said estate in bankruptcy in the sum of Ninety-eight thousand Five hundred ($98,500.00) Dollars, for the payment of which, well and truly to be made, we bind ourselves, our successors, executors and administrators by these presents.

WHEREAS, by an order or injunction issued in a proceeding in the District Court of the United States for the Eastern District of Louisiana, entitled "C. E. Frost and W. S. Lovell, Receivers, et al., against Master of S/S Ingelfingen, et al, No. 14,215" on or about May 6, 1910, Th. Ruhne, Master of the S/S Ingelfingen and the agents of said Steamship, were enjoined from removing from the jurisdiction of this Court a certain lot of 1311 bales of cotton, more particularly described in the pleadings in said proceeding, then laden on said Steamship; and

WHEREAS, it was further provided in said order or injunction that said cotton might be removed out of said jurisdic-

tion upon the filing by the Respondents in said proceeding, or either of them, of a bond for the value of said cotton, which has been fixed by agreement for purposes of bonding at the sum above mentioned.

NOW, THEREFORE, the condition of this obligation is such that if said Th. Ruhne and Isidore Newman and Son, New Orleans, La. above mentioned shall well and truly pay to said obligees the said sum of Ninety-eight thousand Five hundred ($98,500.00) Dollars, or such part thereof as the Court may direct, if, in a suit or action at law or in equity that may or shall hereafter be brought on this bond by said Receivers, or by said Trustee or Trustees, or by said Estate in bankruptcy against the obligors herein, or either of them, in the Circuit or District Courts of the United States for the Eastern District of Louisiana, it shall be adjudged that said Receivers, or said Trustee or Trustees of said Knight, Yancey & Company, or the Bankrupt Estate of said Knight, Yancey & Company have the right, title or interest in or to said cotton, or any part thereof, then and in such case this obligation shall be null, void and of no effect; otherwise the same shall remain in full force and effect.

(Signed) Th. Ruhne.
Approved as to form. By John W. Griffin.
(sig) Saunders, Dufour & Dufour, Attorney for Th. Ruhne.

Witness. (Signed) ISIDORE NEWMAN & SON
(Signed) Henry P. Dart. By J. K. Newman.
This bond as executed is acceptable. E. A. Neugass.
(Signed) S. D. & D.

APPROVED.

(Signed) Rufus E. Foster,
May 11/10 Judge.

And thereupon there was filed in the cause by the parties the supplemental stipulation which is in the words and figures as follows, to-wit:

## SUPPLEMENTAL STIPULATION.

United States Circuit Court, Eastern District of Louisiana.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY

vs. No. 13,839

ISIDORE NEWMAN & SON, ET AL.

## STIPULATION:

It is hereby stipulated and agreed that the value of the several lots of cotton referred to in the petition, at New Orleans, on May 3, 1910, was as follows:

| Marks and No. of bales | | Out-Turn Weight | | Value |
|---|---|---|---|---|
| T S X S | 100 | 50124 | 14-1/8 | $ 7080.01-4/8 |
| T S S T | 100 | 49980 | 14-1/8 | 7059.67-4/8 |
| P S E X | 100 | 50344 | 14-9/16 | 7331.34-4/8 |
| T S L L | 11 | 5709 | 14-1/8 | 806.39-5/8 |
| S D O N | 100 | 49458 | 14-3/8 | 7109.58-6/8 |
| T S C I | 100 | 48006 | 14-3/8 | 6900.86-2/8 |
| T S C Z | 100 | 48087 | 14-1/8 | 6792.28-7/8 |
| T S P G | 100 | 49284 | 14-1/8 | 6961.36-4/8 |
| T S I C | 100 | 48536 | 14-1/8 | 6855.71 |
| P S S I | 150 | 74085 | 14-9/16 | 10788.62-13/16 |
| Q S M P | 150 | 74402 | 14-9/16 | 10834.79-2/16 |
| T S A G | 100 | 49643 | 14-1/8 | 7012.07-3/8 |
| Q N E T | 100 | 49286 | 14-13/16 | 7300.48-14/16 |
| | | | | $92833.22-11/16 |

It is further agreed that if the said cotton had been delivered up to the plaintiff by the Steamship Ingelfingen, on board of which it was at the time of the issue of the restraining order by the District Court, said Steamship would not have been able to secure other cargo to fill its place, and would have been obliged to sail to that extent short of cargo. However, the cotton was bonded and the ship sailed with the cotton as part of her cargo; the freight was paid by the spinners.

It is further agreed that if the Court hold that the value of said cotton is subject to be diminished by the amount of the ship's claim for dead freight or damages in the nature of dead freight, then the total amount of said dead freight or damages is Fourteen Hundred, Eighty-seven and 97/100 Dollars ($1,-487.97), or Twenty-Three Cents ($ .23) per one hundred (100) pounds.

New Orleans, Louisiana, May 24, 1911.

(Signed) Wheeler, Cortiss & Haight,
Dart, Kernan & Dart,
Attys. for Deft.
Dufour & Dufour, & Percy, Benners & Burr.
Attorneys for Plaintiff.

Thereupon there was filed in the cause a further stipulation which is in words and figures as follows, to-wit:

STIPULATION.

United States Circuit Court, Eastern District of Louisiana.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY
vs. No. 13,839
ISIDORE NEWMAN & SON, ET AL.

STIPULATION:

On intervention of (1) The Cotonificio Cantoni, (2) The Cotonificio Furter, (3) The Manifattura Tosi, (4) Gianoli Brothers and (5) A. Bernocchi Brothers:

THIS CASE is submitted by plaintiffs in intervention and defendants therein upon the stipulation and evidence introduced by the parties plaintiff and defendant in the original case.

It is further agreed that all the objections to evidence and all the bills of exception reserved by either of said original parties shall be taken as if made for or against the said intervenors herein, and that the request for findings of fact and conclusions of law preferred by the defendants in the original case shall be taken and considered as if presented and requested on behalf of the intervenors.

NEW ORLEANS, May 29, 1911.

(Signed) Dufour & Dufour,
Percy, Benners & Burr,
Attorneys for Plaintiff.

(Signed) Wheeler, Cortiss & Haight,
Dart, Kernan & Dart,
Attorneys for Defendant.

And thereupon plaintiff moved the Court to make the following special finding of facts, to-wit:

United States Circuit Court, Eastern District of Louisiana.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY

vs. No. 13,839.

ISIDORE NEWMAN & SON, ET. ALS.

Plaintiff's Request to the Court for Special Findings of Fact.

The Court finds the facts in this case to be as agreed upon in the stipulation of facts herein filed, as follows, to-wit:

1. The existence of the corporations and copartnerships mentioned in the fifth paragraph of the answer herein is admitted to

be as therein alleged. Said corporations and co-partnerships are hereinafter referred to as the spinners.

2. On or about the dates stated in Exhibits 1 to 8, attached hereto, the spinners agreed respectively to purchase from Knight, Yancey & Company, and Knight, Yancey & Company agreed to sell to the spinners respectively, the quantites of cotton stated in the attached documents numbered Exhibits 1 to 8 inclusive. Said agreements were negotiated and concluded through one Gino Gavirati, a cotton broker residing at Milan, Italy. The said documents, Exhibits 1 to 8 inclusive are the original brokers' memoranda of said contracts, and correctly state the terms thereof; translations thereof are attached as Exhibits 1-A to 8-A, both inclusive.

3. On or about the dates indicated therein respectively the firm of Knight, Yancey and Company, by or at the instance of John W. Knight, the managing partner of said firm, made up and issued thirteen documents purporting to be bills of lading of the Southern Railway Company. Said documents were not, however, valid bills of lading of said Southern Railway Company, but were signed by or at the instance of Knight, Yancey & Company acting through said John W. Knight, with the names of the agents of said Railway Company, by whom bills of lading are customarily signed at the points where said pretended bills of lading purported to have been issued. Said pretended bills of lading were made up on the blank forms in use by said Railway Company. Said pretended bills of lading are hereto attached and marked Exhibits 9 to 21 inclusive. No cotton was in fact received by said Railway Company as recited in said pretended bills of lading. The statement in the last sentence is without prejudice to defendants contention that the cotton received by the Railroad Company hereinafter referred to is referable to said pretended bills of lading.

4. Thereupon, Knight, Yancey & Company, acting by said John W. Knight, drew thirteen drafts on the bankers mentioned in said contracts of sale respectively, who were the bankers of the spinners respectively and were authorized by the spinners to accept and pay the drafts to be drawn under said contracts of sale. Said drafts are hereto annexed and marked

Exhibits 22 to 34 inclusive, and were drawn on the dates which they bear, respectively.

5. Knight, Yancey & Company, acting through John W. Knight, thereupon attached said drafts to said pretended bills of lading respectively, and also attached thereto respectively the certificates of insurance which are hereto attached and marked Exhibits 35 to 46 inclusive, and the invoices which are hereto attached and marked Exhibits 47 to 58 inclusive.

6. Knight, Yancey & Company, acting through said John W. Knight, thereupon endorsed said drafts, pretended bills of lading, and certificates of insurance in blank, and discounted said drafts with the other documents mentioned above attached thereto respectively, with certain bankers, and received and retained the proceeds of said drafts, which amounted to the face of said drafts, less discount.

7. The purchasers of said drafts and attached documents, thereupon sent them forward through their correspondents to the respective drawees for acceptance, and the same were by them accepted on the dates indicated by the acceptances appearing on the face of said drafts and the said pretended bills of lading were thereupon delivered to the spinners respectively. The said drawees accepted the said drafts in good faith, and in reliance on the documents thereto attached, including the pretended bills of lading which they and the spinners honestly believed to be genuine bills, representing goods actually shipped by carrier as therein stated. At the maturity of said drafts, they were paid in full by the respective drawees to the respective holders; and the said drawees have been duly reimbursed for said payments by the spinners respectively.

8. On the dates indicated in Exhibits 59 to 71 inclusive respectively, Knight, Yancey & Company actually shipped by the Southern Railway Company 1400 bales of their cotton, which was acquired by them after the dates of the drafts before mentioned for which the agents of said Railway at the points of shipment issued thirteen bills of lading which are hereto annexed and marked Exhibits 59 to 71 inclusive. Said cotton was marked by Knight, Yancey & Company with the marks indicated in said

bills of lading, and was consigned as therein indicated, and was carried by said Railway Company to the port of Chalmette, where it was by said Railway Company delivered to the ocean carrier mentioned in said bills of lading. Said ocean carrier shipped eighty nine bales thereof marked TSLL by the Steamship Sicania, and the remaining 1311 bales were the cotton mentioned in the restraining order issued by the United States District Court for the Eastern District of Louisiana on the 3rd day of May, 1910, and the same which is mentioned in the bond in suit. At the time when said order was issued, said 1311 bales were loaded on the Steamship Ingelfingen, a vessel of the Cotoniera Line.

9. Of the bills of lading, Exhibits 59 to 71, those dated at Decatur and marked PSEX, TSXS, TSLL, PSSI, QSMP, TSAG and QNET were retained by Knight, Yancey & Company from the time of their issuance by the Railway Company until the appointment of petitioner as their Trustee in bankruptcy, and were then endorsed and delivered to the petitioner by Knight, Yancey & Company; those dated at Selma, and marked SDON, TSCI, TSCZ, TSPG and TSIC were received by Charles A. Patterson, the duly authorized agent of Knight, Yancey & Company, at Selma, Alabama, with full authority in and about the matters herein referred to, from the Railway Company, on the dates they severally bear, and thereafter were by him endorsed for Knight, Yancey & Company, and in their names, and hypothecated with a bank in Selma, Alabama, as collateral security for advances of money made by it to Knight, Yancey & Company, and were by him thereafter attached to negotiable drafts drawn by said Patterson, as such agent, on Knight, Yancey & Company at Decatur, Alabama, for sums of money approximating the value of the cotton covered by said bills of lading, payable to said bank at Selma, which drafts were accepted and paid by Knight, Yancey & Company, and said bills of lading thereupon delivered to them prior to the filing of the petition in bankruptcy, at Decatur, Alabama, on the day of April, 1910, freed of any claims thereon on the part of the bank, and were by Knight, Yancey & Company retained until the appointment of petitioner as their

Trustee in Bankruptcy, when they were delivered by them to said Trustee.

10. The signatures of Knight, Yancey & Company on the drafts hereto attached and marked Exhibits 22 to 34 inclusive are the genuine signatures of that firm, signed by said John W. Knight. The acceptances and endorsements thereon are the genuine acceptances and endorsements of the persons whose they purport to be and were placed thereon in due course. The endorsements of Knight, Yancey & Company on the pretended bills of lading, Exhibits 9 to 21, and on the insurance certificates, Exhibits 35 to 46 are the genuine endorsements of Knight, Yancey & Company placed thereon by said John W. Knight. The signature of A. A. Raven and of Mather & Company on said insurance certificates are genuine. The insurers issuing said certificates had no knowledge that the cotton referred to therein was not shipped until they acquired such knowledge after the bankruptcy. Said certificates of insurance were delivered to Knight, Yancey & Company in blank by the insurers, and were filled out by said Knight, Yancey & Company, which by the terms of the open policy referred to in said certificates they were legally authorized to do in cases where they were actually shipping cotton. No further insurance was affected by Knight, Yancey & Company on the cotton actually shipped by them as aforesaid.

11. The attached photographs, Exhibits 14 and 27, are photographs of the pretended bill of lading and of the draft marked TSLL, and have the same force and effect as though they were the original documents. The pretended bill of lading marked TSLL bears the same endorsement in the same handwriting as the remainder of said pretended bills of lading. An invoice and a certificate of insurance similar to those hereto attached were attached to said pretended bill of lading marked TSLL.

12. The endorsements of the pretended bills of lading marked PSSI, QSMP, TSAG and QNET by the Cotonificio Cantoni; and of the pretended bill of lading marked TSXS by Gianoli Brothers, were endorsements to their receiving agents at Genoa. Said endorsements did not transfer any right, title or interest

which said Cotonificio Cantoni and said Gianoli Brothers may have had in said pretended bills of lading, or in said cotton to said receiving agents, but any such rights remained unaffected by said endorsements.

The memoranda of contract Exhibits 1 and 6 were concluded on cables sent by Knight, Yancey & Company on January 14th, 1910, and December 14th 1909, respectively, and received by said Gavirati on the day when he received said cables, whereas the invoices prepared by Knight, Yancey & Company, and marked TSXS, TSST, PSSI and QSMP, respectively (Exhibits 47, 48, 55 and 56), refer to the date when said cables were sent.

13. The individuals composing the partnership of Knight, Yancey & Company were individually adjudicated bankrupts pursuant to the Act of Congress relating to Bankruptcy, at or about the time of the appointment of petitioner as Trustee in Bankruptcy of Knight Yancey & Company; and the individual estates of said partners, taken in connection with the estate of said partnership, are not sufficient to pay the claims which have been proven in bankruptcy against said partnership. At all the times herein mentioned, the residences of the partners composing said firm of Knight, Yancey & Company were as follows: John W. Knight, Decatur Alabama; Wm. J. Yancey, Memphis, Tennessee; Wm. D. Nesbitt, Birmingham, Alabama; and Robert H. Nesbitt, Spartanburg, South Carolina. The residence of petitioner is at Birmingham, Alabama. The residences of defendants are in New Orleans, Louisiana. The amount in dispute is more than two thousand dollars.

14. The cotton shipped as aforesaid was of the grades called for by said contracts of purchase, Exhibits 1 to 8 inclusive, respectively, and if the plaintiff is entitled to recovery he is entitled to recover the value of the cotton in the New Orleans Market on the day when the restraining order was issued. Prior to the trial, the parties hereto are to agree on said market value per pound on that day and on the number of pounds in each of said lots of cotton, and to make a further stipulation to cover same. The defendant also claims, and the plaintiff denies, that the value so fixed ought to be reduced by the amount of any

claim for dead freight which the ship or ocean carrier would have had against said cotton or the owner thereof, if said cotton had not gone forward on said vessel; and it is understood that defendant may, on the trial thereof, offer evidence in proof of such claim for dead freight. It is agreed that said dead freight would be at the rate of twenty-three cents per 100 lbs.

15. Knight, Yancey & Company were duly adjudicated bankrupts by the District Court of the United States for the Northern District of Alabama, on, to-wit: April 20th, 1910. Clarence E. Frost, sometimes called C. E. Frost, and William S. Lovell, sometimes called W. S. Lovell, were duly appointed the Receivers in Bankruptcy of said bankrupt estate on, to-wit: the 21st day of April, 1910, and were duly authorized by said Court to institute proceedings to restrain the removal of said cotton referred to in the petition. A true copy of the record of the said proceedings, including the bonds given under the decree, is hereto attached. William S. Lovell was duly appointed Trustee in Bankruptcy of Knight, Yancey & Company, in said bankruptcy proceedings, on May 26th, 1910, and duly qualified as such.

16. Knight, Yancey & Company for five years or more prior to their bankruptcy were largely engaged in exporting cotton from the United States. It was the custom of Knight, Yancey & Company to use combinations of letters in identifying marks for the lots of cotton shipped by them, which combinations were never repeated unless by accident or at long intervals of time.

The Court further finds the following facts.

1. When Knight, Yancey & Company delivered the lots of cotton in question to the carriers at Decatur and Selma, respectively, Knight, Yancey & Company did not intend that title to said cotton should then pass to the spinners. Knight, Yancey & Company delivered their cotton, as declared in the stipulation, to the Railroad Companies, and received from the Railroad Companies bills of lading to shipper's order, thus retaining the jus disponendi. There is no proof that Knight, Yancey & Company did intend that title should pass to the spin-

ners, and, therefore, the Court finds as a fact that they did not so intend. The defendants failed to adduce proof to overcome the legal presumption.

2. The shipments called for by the various contracts were for January and February, 1910, shipment. No shipments in point of fact were made in January and February, 1910. All of the shipments, as appears from the statement of facts, were made in April, 1910, with the exception of one shipment made in March, 1910. There is no proof in the record that the spinners consented to the modification of the contract for March-April shipment instead of January-February shipment, and, therefore, the Court finds as a fact that there was no mutual understanding to the change or modification of the contract in the particular aforementioned, and that, therefore, there was no delivery under the contract.

3. The contracts in question were all C. i. f. contracts, that is costs, insurance and freight to be paid by the shippers. No insurance was taken out by Knight, Yancey & Company in favor of the spinners, or anybody else, when they delivered the actual cotton to the carrier; and therefore, when the cotton was delivered to the carrier, and at all times thereafter, same was not insured in favor of the spinners as provided for in their respective contracts. Said cotton was at the risk of Knight, Yancey & Company, who held the bills of lading therefor to shipper's order, and a portion of said cotton was in fact thereafter hypothecated by Knight, Yancey & Company for their debt.

We submit that the foregoing findings of fact should be made and taken under and in connection with the law applicable to the case and that there should be a judgment in favor of the plaintiff for the full amount claimed in the petition.

Respectfully submitted,

(signed) Dufour & Dufour,

Percy, Benners & Burr,

Attys. for Plaintiff.

Plaintiff thereupon moved the Court to find the facts in this cause as set forth in his written request hereinbefore set forth, which motion the Court overruled; to which action of the Court plaintiff then and there excepted with the permission of the Court, on which exception plaintiff still insists.

Thereupon the defendants moved the Court to make the following special finding of facts, to-wit:

United States Circuit Court, Eastern District of Louisiana.

WILLIAM S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY, Bankrupts,

vs.

ISIDORE NEWMAN, ET AL.

DEFENDANTS REQUEST THE COURT TO MAKE AND FILE THE FOLLOWING FINDINGS OF FACT AND CONCLUSIONS OF LAW.

FINDINGS OF FACT.

I.

Prior to the institution of the injunction proceedings mentioned in the peittion and at all time since, the Cotonificio Cantoni, the Cotonificio Furter, and the Manifattura Tosi, were corporations organized under the laws of the Kingdom of Italy and engaged in business as cotton spinners, the first and second at Milan, Italy, and the last at Busto Arsizio, Italy. At all said times Guido Gianoli, Rinaldo Gianoli, Giovanni Gianoli, and Carina Dupre Gianoli have been and still are engaged in business as cotton spinners at Vigevano, Italy, as co-partners under the firm name of Fratelli Gianoli, or Gianoli Brothers. At all said times Antonio Bernocchi, Alessandro Bernocchi, Michael Bernocchi, and Andrea Bernocchi, have been and still are engaged in business as cotton spinners at Legnano, Italy, as co-partners under the firm name of A. Bernocchi & Fratelli, or

A. Bernocchi & Brothers. Said corporations and copartnerships are hereinafter referred to as the "Spinners."

II.

Knight, Yancey & Company were duly adjudicated bankrupts by the District Court of the United States for the Northern District of Alabama on April 20, 1910, and on April 21, 1910, Clarence E. Frost and William S. Lovell were duly appointed receivers in bankruptcy of said estate, and authorized by said Court to institute proceedings to restrain the removal of the cotton referred to in the petition. A true copy of the record of said proceedings, including the bonds given under the decree of the Court is attached to the agreed statement of facts herein. William S. Lovell was duly appointed Trustee in Bankruptcy of Knight, Yancey & Company on May 26, 1910, and duly qualified as such.

III.

The individuals composing the partnership of Knight, Yancey & Company, were individually adjudicated bankrupts at or about the time of the appointment of the plaintiff as trustee in bankruptcy of Knight, Yancey & Company, and their individual estates, taken in connection with the estate of said partnership, are not sufficient to pay the claims which have been proved in bankruptcy against the said partnership.

At all the times herein mentioned the residences of the partners composing said firm were as follows: John W. Knight, Decatur, Alabama; William J. Yancey, Memphis, Tennessee; William D. Nesbitt, Birmingham, Alabama; and Robert H. Nesbitt, Spartanburg, Alabama. The residence of the plaintiff is at Birmingham, Alabama. The residences of the defendants Newman, et al, are New Orleans, Louisiana; those of the spinners are in Italy.

The amount in dispute is more than two thousand dollars.

IV.

On the dates stated in the documents offered in evidence herein, marked Exhibits 1 to 8 inclusive, the spinners agreed, respectively, to purchase from Knight, Yancey & Company, and Knight, Yancey & Company agreed to sell to the spinners, respectively, the quantities of cotton stated in said Exhibits 1 to 8, inclusive, to be of the grades therein stated. Said agreements were negotiated and concluded through one Gino Gavirati, a cotton broker residing at Milan, Italy. Exhibits 1 to 8, inclusive, are the original broker's memoranda of said contracts, and correctly state the terms thereof, Exhibits 1-A to 8-A, are translations of said contracts, respectively,.

V.

On the dates therein mentioned respectively the firm of Knight, Yancey & Company, by or at the instance of John W. Knight, managing partner of said firm, made up and issued Thirteen (13) documents, purporting to be bills of lading of the Southern Railway Company. Said documents were not genuine bills of lading of said railway company, but were signed by or at the instance of Knight, Yancey & Company, acting through said John W. Knight, with the names of the agents of said Railway Company by whom bills or lading are customarily signed, at the points where said documents purported to have been issued. They were made up on the bill of lading forms in use by said Southern Railway Company, and are marked Exhibits 9 to 21 inclusive.

At the time when said documents were thus issued, respect-ively no cotton was, in fact received by said Railway Company, as stated therein.

VI.

Thereupon Knight, Yancey & Company, acting by said John W. Knight, drew thirteen drafts on the bankers mentioned in said contracts of sale, (Exhibits 1 to 8 inclusive) respectively,

who were the bankers of the spinners, respectively, and were by them duly authorized to accept and pay the drafts to be drawn under said contracts of sale. Said drafts are Exhibits 22 to 34 inclusive, herein, and were drawn on the dates which they bear, respectively.

VII.

Thereupon Knight, Yancey & Company, acting through John W. Knight, attached said drafts to Exhibits 9 to 21, inclusive, respectively, and also attached thereto, respectively, the certificates of insurance, Exhibits 35 to 46, inclusive, and the invoices, Exhibits 47 to 58, inclusive.

VIII.

Knight, Yancey & Company, acting through John W. Knight, thereupon endorsed said drafts, (Exhibits 22 to 34, inclusive), bills of lading, (Exhibits 9 to 21, inclusive), and certificates of insurance (Exhibits 35 to 46, inclusive), in blank, and discounted said drafts with the other documents mentioned above attached thereto, respectively with certain bankers, and received and retained the proceeds of said drafts which amounted to their face value less discount.

IX.

The purchasers of said drafts and attached documents thereupon sent them forward through their correspondents to the respective drawees for acceptance, and the same were by them accepted on the dates indicated by the acceptances appearing on the face of said drafts. The bills of lading, (Exhibits 9 to 21, inclusive) were then delivered to the spinners, respectively, who thereupon became the owners thereof. The said drawees accepted said drafts in good faith and in reliance on the documents, thereto attached, including the bills of lading, which they and the spinners honestly believed to be genuine bills of lading, representing goods actually shipped by carrier as therein stated.

At the maturity of said drafts they were paid in full by the respective drawees to the respective holders and the said drawees have been duly reimbursed for said payments by the spinners, respectively.

X.

After the issue of said bills of lading and prior to the filing of the petition in bankruptcy herein, and on the following dates respectively, March 16, 1910, April 1, 1910, April 6, 1910, April 7, 1910, and April 11, 1910, Knight, Yancey & Company actually shipped by the Southern Railway cotton aggregating Fourteen hundred (1400) bales, divided into lots of the same numbers of bales each as the lots stated in Exhibits 9 to 21, inclusive, to have been shipped. Said lots of cotton were marked respectively by Knight Yancey & Company with the marks indicated in Exhibits 9 to 21, inclusive, respectively, and the respective lots were shipped at the places at which Exhibits 9 to 21, inclusive, bear dates respectively, and were consigned as stated in Exhibits 9 to 21, inclusive. Said cotton was carried by said Railway to Port Chalmette, Louisiana, where it was, by said railway, delivered to the ocean carrier mentioned in the contracts of purchase, Exhibits 1 to 8, inclusive, and in the bills of lading, Exhibits 9 to 21, inclusive. Said ocean carrier shipped eighty-nine (89) bales thereof marked TSLL by the Steamship Sicania, and the remaining thirteen hundred and eleven (1311) bales was the cotton mentioned in the restraining order issued by the United States District Court for the Eastern District of Louisiana, on the 3rd day of May, 1910, and the same which is mentioned in the bond in suit. At the time when said order was issued, said Thirteen hundred and eleven (1311) bales were loaded on the Steamship "Ingelfingen," a vessel of the Cotoniera Line.

XI.

The cotton shipped as aforesaid was of the grades called for in said contracts, Exhibits 1 to 8, inclusive. The value of the

same at the time and place when and where said restraining order was issued is as stated in the stipulation filed herein, and dated May 1911.

Said cotton in the hands of the ocean carrier was subject to a lien for dead freight at the rate of 23 cents per one hundred pounds, or a total of $1,487.97, as against the plaintiff herein.

XII.

Knight, Yancey & Company for five years or more prior to their bankruptcy, were largely engaged in exporting cotton from the United States. It was their custom to use combinations of letters as identifying marks for the lots of cotton shipped by them, which combinations were never repeated, unless by accident or at long intervals of time.

XIII.

The signatures of Knight, Yancey & Company to the drafts marked Exhibits 22 to 34, inclusive, are the genuine signatures of that firm, signed by John W. Knight. The acceptance and endorsements thereon are the genuine acceptances and endorsements of the persons whose they purport to be, and were placed thereon in due course. The endorsements of Knight, Yancey & Company on Exhibits 9 to 21, and on Exhibits 35 to 46, are the genuine endorsements of Knight, Yancey & Company, placed thereon by said John W. Knight. The signatures of A. A. Raven and of Mather & Company on said Exhibits 35 to 46, are genuine. The insurers issuing said certificates had no knowledge that the cotton referred to therein was not shipped until they acquired such knowledge after the bankruptcy; said certificates were delivered to Knight, Yancey & Company in blank by the insurers and were filled out by Knight, & Company, which, by the terms of the open policy referred to in said certificates, they were legally authorized to do, in cases where they actually shipped cotton. No further insurance was affected by Knight, Yancey & Company on the cotton actually shipped by them as aforesaid.

XIV.

Exhibits 14 and 27 are photographs of the pretended bill of lading and of the draft marked TSLL; and have the same force and effect as though they were the original documents. The pretended bill of lading marked TSLL bears the same endorsement in the same handwriting as the remainder of the said pretended bills of lading and invoices, and a certificate of insurance and invoice similar to those in evidence herein were attached to said pretended bill of lading marked TSLL. The invoice stated the date of the order to be 1/15/10.

XV.

The endorsement of the pretended bills of lading marked PSSI, QSMP, TSAG and QNET by the Cotonificio Cantoni, and of the pretended bill of lading marked TSXS by Gianoli Brothers were endorsements to their receiving agents at Genoa, and said endorsements did not transfer the right, title or interest which said spinners had in said bills of lading, or in said cotton to said receiving agents, but their rights remained unaffected by such endorsements.

The contracts, Exhibits 1 and 6 were concluded on cables sent by Knight, Yancey & Company on January 14, 1910, and on December 14, 1909 respectively, and received by Gavirati on the following day. Said contracts were therefore dated by Gavirati on the day when he received the said cables, whereas the invoices prepared by Knight, Yancey & Company and marked TSXS, TSST, PSSI and QSMP, respectively, (Exhibits 47, 48, 55 and 56) refer to the dates when said cables were sent.

XVI.

The shipment of the said cotton by Knight, Yancey & Company as aforesaid was made with the intent on the part of Knight, Yancey & Company to conceal and cover up the fraud practiced by them on the spinners, as aforesaid, and with the

intent by said shipments to appropriate said cotton to the fulfillment of the contracts, Exhibits 1 to 8, inclusive, respectively, and to the pretended bills of lading, Exhibits 9 to 21, inclusive, and with the intent to pass title thereto to the spinners upon such shipments and with the intent and expectation that said cotton would go forward and be delivered on said bills of lading, Exhibits 9 to 21, inclusive.

XVII.

Title to said respective lots of cotton did in fact pass to said spinners, respectively upon said shipment thereof, and prior to the appointment of the plaintiff as Trustee in Bankruptcy.

XVIII.

At the time of the issuance of the restraining order by the United States District Court for the Eastern District of Louisiana, to-wit: on May 3rd, 1910, the Plaintiff as Trustee in bankruptcy had no right, title or interest in or to said cotton, or any part thereof, and has never had any right, title or interest in or to said cotton or any part thereof.

XIX.

Knight, Yancey & Company and the plaintiff as their successor in title, are estopped by the fraudulent acts of Knight, Yancey & Company, as recited above, to allege or establish in themselves any right, title or interest in or to said cotton or any part thereof, and to deny that title to the same passed to the spinners upon the shipment thereof, and are further estopped to deny that Exhibits 9 to 21, inclusive, were in fact genuine and valid bills of lading, representing the cotton which they purported to represent and are further estopped to deny that the cotton referred to in the petition is in fact the cotton referred to in and represented by said bills of lading, Exhibits 9 to 21, inclusive.

XX.

The shipment of said cotton was in fact designed by Knight, Yancey & Company as a shipment under the terms of said contracts Exhibits 1 to 8, inclusive, and was accepted as such by the spinners respectively, and thereby, in pursuance of the provisions of said contracts, title to each of the lots of said cotton, upon the shipment thereof, passed to the spinners respectively.

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## CONCLUSIONS OF LAW

I.

The shipment of the said cotton by Knight, Yancey & Company as aforesaid, was made with the intent on the part of Knight, Yancey & Company to conceal and cover up the fraud practiced by them on the spinners as aforesaid and with the intent by said shipments to appropriate said cotton to the fulfillment of the contracts, Exhibits 1 to 8, inclusive, respectively and to the bills of lading, Exhibits 9 to 21, inclusive, and with the intent to pass title thereto to the spinners upon such shipments and with the intent and expectation that said cotton would go forward and be delivered on said bills of lading, Exhibits 9 to 21, inclusive.

II.

Title to said respective lots of cotton did in fact pass to said spinners respectively, upon the shipment thereof and prior to the appointment of the plaintiff as Trustee in Bankruptcy.

III.

At the time of the issuance of the restraining order by the United States District Court for the Eastern District of Louisi-

ana, to-wit: on May 3rd, 1910, the plaintiff, as Trustee in Bankruptcy, had no right, title or interest in or to said cotton or any part thereof, and has never had any right, title or interest in or to said cotton or any part thereof.

IV.

Knight, Yancey & Company and the plaintiff, as their successors in title are estopped by the fraudulent acts of Knight, Yancey & Company as recited above to allege or establish in themselves any right, title or interest in or to said cotton, or any part thereof, and to deny that title to the same passed to the spinners upon the shipment thereof, and are further estopped to deny that Exhibits 9 to 21, inclusive, were in fact genuine and valid bills of lading, representing the cotton which they purported to represent, and are further estopped to deny that the cotton referred to in the petition is in fact the cotton referred to in and represented by said bills of lading, Exhibits 9 to 21, inclusive.

V.

The shipment of said cotton was in fact designed by Knight, Yancey & Company as a shipment under the terms of the contracts 1 to 8, inclusive, and was accepted as such by the spinners respectively, and thereby, in pursuance of the provisions of the said contracts, title to each of the lots of said cotton upon the shipment thereof passed to the spinners respectively.

VI.

There should be judgment for the defendants and intervening Petitioners with costs, and the entry and docketing thereof is hereby directed.

If the Court should over-rule the objections made by the Defendants on the trial,

(1) To so much of paragraph 8 of the agreed statement of facts as states (A) the date when the cotton was acquired by

Knight, Yancey & Company; (b) that it was acquired by Knight, Yancey & Company after the dates of the drafts; and (c) that a second set of bills of lading was issued.

(2) To the whole of paragraph 9 of the agreed statement of facts, and,

(3) To Exhibits 59 to 71, inclusive.

Or if the Court should over-rule any of the said objections, then not waiving, but insisting on their exceptions to said rulings and to each of them, and subject to their Bill of Exceptions thereon, the Defendants request the Court, in so far as it makes findings of fact thereon, to make the same in the following form, without prejudice to Defendants' right to except to said findings of fact and to each of them and to assign error thereon;

I

The cotton shipped by Knight, Yancey & Company, as aforesaid, was acquired by them after the dates of the drafts before mentioned and was shipped on or about the dates stated in Exhibits 59 to 71, inclusive, respectively.

The agents of said Southern Railway Company at the points of shipment respectively issued therefor thirteen bills of lading (Exhibits 59 to 71, inclusive), on the dates which they bear respectively.

II

Of the bills of lading, Exhibits 59 to 71, inclusive, those dated at Decatur, Alabama, and marked P S E X, T S X S, T S S T, T S L L, P S S I, Q S M P, T S A G and Q N E T were suppressed by Knight, Yancey & Company and were retained by them from the time of their issuance by the railway company until the bankruptcy of Knight, Yancey & Company, and were thereafter still retained by Knight, Yancey & Company and concealed from their receivers until some period subsequent to the appointment of the plaintiff as the Trustee in Bankruptcy

of Knight, Yancey & Company, which took place on May 26, 1910, and were then endorsed and delivered by Knight, Yancey & Company to the plaintiff; those dated at Selma, Alabama, and marked S D O N, T S C I, T S C Z, T S P G, and T S I C, were received by Charles A. Patterson, the duly authorized agent of Knight, Yancey & Company, at Selma, Alabama, with full authority from Knight, Yancey & Company in and about the matters herein referred to from the railway company on the dates which they severally bear, and on some date thereafter were by him endorsed for Knight, Yancey & Company and in their name, and said Patterson thereupon hypothecated or purported to hypothecate them with a bank in Selma, Alabama, as collateral security for advances of money made by it to Knight, Yancey & Company, and he thereafter attached them to negotiable drafts drawn by him as such agent on Knight, Yancey & Company at Decatur, Alabama, where the main office of Knight, Yancey & Company was located for sums of money approximating the value of the cotton covered by said bills of lading, payable to said bank at Selma, which drafts were accepted and paid by Knight, Yancey & Company, and said bills of lading were thereupon delivered to them at Decatur, Alabama, on April 16, 1910, prior to the filing of the petition in bankruptcy, freed of any claim thereon the part of the bank and were thereupon suppressed by Knight, Yancey & Company and retained until their bankruptcy, after which they were still retained by Knight, Yancey & Company concealed from the receivers and they remained in the possession of Knight, Yancey & Company until some date subsequent to the appointment of the Plaintiff as Trustee in Bankruptcy, which took place on May 26, 1910. The sending of said bills of lading from Selma to Decatur, as aforesaid, was for the purpose of putting the main office of Knight, Yancey & Company in possession of said bills of lading, and to reimburse the Selma office from the Decatur office for moneys expended in the purchase of said cotton.

III

The holding and suppressing of said bills of lading by Knight, Yancey & Company was done by them for the purpose of con-

cealing the fraud of which they had been guilty; and with the intent on their part that said cotton should go forward and be delivered under the bills of lading Exhibits 9 to 21 inclusive, and not with intent to retain in themselves any title to or jus disponendi over said cotton; and neither they nor the plaintiff thereby retained or acquired any right, title or interest in or to said cotton, or any part thereof as against the defendants, or the intervening petitioners herein.

IV

Knight, Yancey & Company and the plaintiff are estopped by reason of the fraud above mentioned to set up or claim any right, title or interest in or to said cotton, or any part thereof by virtue of said bills of lading Exhibits 59 to 71, inclusive.

In the event that the Court over-rules the objections mentioned above, then, not waiving but insisting on their exceptions to said rulings and to each of them, and subject to defendants' bill of Exceptions thereon, defendants request the Court to make additional Conclusions of Law, as follows:

I

The holding and suppressing of said bills of lading by Knight, Yancey & Company was done by them for the purpose of concealing the fraud of which they had been guilty; and with the intent on their part that said cotton should go forward and be delivered under the bills of lading Exhibits 9 to 21, inclusive, and not with intent to retain in themselves any title to or jus disponendi over said cotton; and neither they nor the plaintiff thereby retained or acquired any right, title or interest in or to said cotton, or any part thereof as against the defendants or intervening petitioners herein.

II

Knight, Yancey & Company and the plaintiff are estopped by reason of the fraud above mentioned to set up or claim any right

title or interest in or to said cotton or any part thereof by virtue of said bills of lading, Exhibits 59 to 71, inclusive.

Dated New Orleans, May 24, 1911,

(signed) Dart, Kernan & Dart,
Wheeler Cortis & Haight,
Attorneys for Defendants and Intervening Petitioners.

The evidence set forth in this bill of exception was all of the evidence introduced on the trial of this cause. The attorneys of the parties agree that the documentary evidence introduced in the cause shall be abridged for the purpose of avoiding unnecessarily encumbering the record as hereinabove set forth.

(Signed) Dufour & Dufour
Percy, Benners & Burr,
Attorneys for Plaintiff.

Wheeler, Cortis & Haight.
Dart, Kernan & Dart.
Attorneys for Defendants.

Thereupon the plaintiff moved the Court to find the facts as stipulated by the parties and as set forth in the stipulation filed in this cause, and upon such finding render judgment in favor of the plaintiff and against the defendants, Isidore Newman & Son and E. A. Neugass in the sum of NINETY ONE THOUSAND THREE HUNDRED AND FORTY FIVE and 25/100 DOLLARS ($91,345.25), which motion of the plaintiff the Court overruled and the plaintiff then and there excepted, which exception was allowed by the Court and on which exception plaintiff still insists.

Thereupon the cause was argued by the attorneys for the parties and was by the Court taken under advisement, to allow the attorneys for the patries to file briefs, which briefs were filed by the attorneys for the respective parties and were submitted to the Court, and thereafter on to-wit, June 27, 1911, the Court caused the attorneys for the parties to come before it and announced

that they had reached a decision in this cause, and thereupon made and filed in this cause his finding of facts, which finding of facts is in words and figures as follows, to-wit:

United States Circuit Court, Eastern District of Louisiana.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY.

versus No. 13,839.

ISIDORE NEWMAN & SON.

1. I overrule the objections of both the plaintiff and defendants to the admission of the agreed statement of facts filed herein.

2. I deny the motion of the plaintiff to find the facts as set out in his special request.

3. I deny the motion of the defendants to find the facts as set out in their special request.

I find the facts herein as follows:

1. That Knight, Yancey & Company entered into eight valid contracts for the sale of 1400 bales of cotton to the following named spinners, who have intervened herein, in the several amounts, of the qualities and for the prices as shown by the said contracts, which said contracts, together with translations of same, are hereto annexed and made part hereof, to-wit:

The Cantonificio Cantoni, a corporation organized and existing under the laws of the Kingdom of Italy and engaged in the business of cotton spinners at Milan, Italy.

The Cantonificio Furter, a corporation organized and existing under the laws of the Kingdom of Italy and engaged in the business of cotton spinners at Milan, Italy.

The Manifattura Tosi, a corporation organized and existing under the laws of the Kingdom of Italy and engaged in the business of cotton spinners at Busto Arsizio, Italy.

Gianoli Brothers, a co-partnership composed of Gido Gianoli and Carina Dupre Gianoli, doing business as cotton spinners at Vigevano, Italy.

A. Bernocchi Brothers, a co-partnership composed of Antonio Bernocchi, Alessandro Bernocchi, Michael Bernocchi and Andrew Bernocchi, doing business as cotton spinners at Legano, Italy.

2. That Knight, Yancey & Company forged thirteen bills of lading, purporting to show the shipment of said 1400 bales of cotton in compliance with the said eight contracts and annexed them to thirteen drafts, together with thirteen invoices and thirteen certificates of insurance, which said forged bills of lading, insurance certificates and drafts are annexed to and made part hereof.

3. That these drafts were drawn by virtue and in pursuance of the said eight contracts of sale, and were discounted by Knight, Yancey & Company in the usual course of business and they received and converted the proceeds to their own use.

4. That said drafts were accepted and ultimately paid in good faith by the said purchasers named above.

5. That on March 16 and 17 and April 1, 6, 7, and 11, 1910, Knight, Yancey & Company delivered to the Southern Railway at certain points in Alabama, 1400 bales of cotton of the grade specified in the said eight contracts and invoices and marked identically as shown by the bills of lading and other documents annexed to the drafts above referred to.

6. That by marking and shipping the said cotton, as above set out, Knight, Yancey & Company intended to appropriate and did appropriate it to the fulfillment of the said eight contracts of sale, and that by delivering it to the carrier they perfected delivery to the buyers under the terms of the said contracts.

7. That Knight, Yancey & Company retained the genuine bills of lading for the said cotton in their own possession, and that it was their intention to suppress them and to allow the buyers to

claim the cotton on the forged bills of lading attached to the drafts above mentioned.

8. That all right, title and interest of Knight, Yancey & Company to the said 1400 bales of cotton had passed out of them, and that they had no lien or claim of any kind upon it, before their adjudication in bankruptcy.

9. That the said trustee has no right, title or interest in or to, or claim upon, the said cotton of any nature whatsoever.

10. That Knight, Yancey & Company and their trustee, plaintiff herein, are estopped to assert any right, title or interest in or to the said 1400 bales of cotton.

11. That the court has jurisdiction of the parties and the subject matter of the suit.

To this finding of fact and to each paragraph thereof separately plaintiff objected on the ground that such finding was not supported by the stipulation of the parties filed in this cause and moved the Court to set aside said finding and to find that the Trustee had the right, title and interest in the cotton, the subject matter of this suit at the time that same was seized pursuant to the order of the District Court, which motion of the plaintiff was by the Court overruled; to which action of the Court plaintiff then and there reserved an exception by the Court's leave on which exception plaintiff still insists.

Thereupon the defendants moved the Court to enter judgment for the defendants for their costs, which the Court thereupon did, to which action of the Court plaintiff then and there by the Court's leave reserved an exception, on which exception he still insists.

And now in furtherance of justice and that right may be done, the plaintiff, Wm. S. Lovell, as Trustee of Knight, Yancey & Company, Bankrupt, tenders and presents the foregoing as his bill of exceptions in this cause to the several actions of the Court hereinabove set forth to which exception has been reserved, and prays that the same may be allowed and signed and sealed by the Court as a true bill of exceptions and made a part of the record.

All of which is accordingly done by the Honorable Rufus E. Foster, the Judge who presided on the trial of said cause and who decided the same and rendered the judgment therein, within the term at which said cause was tried and determined, that is to say on the to-wit: 30th day of September, 1911, as witness his hand.

(Signed) Rufus E. Foster,
Judge.

## PETITION FOR WRIT OF ERROR AND ORDER.

Filed October 4th, 1911.

In the United States Circuit Court, Eastern District of Louisiana.

WILLIAM S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY, BANKRUPT

Plaintiff,

versus No. 13,839.

ISIDORE NEWMAN & SON, ET ALS.

Defendants.

The Contonificio Cantoni; The Contonificio Furter; The Manifattura Tosi; Gianoli Brothers; A. Bernocchi Brothers.

Intervenors.

TO THE HONORABLE RUFUS E. FOSTER, JUDGE:

By this petition, the above named, William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company, shows unto your Honor that there has interfered in the record and proceedings in the Circuit Court of the United States for the Eastern District of Louisiana in the above styled cause manifest error to the injury of the above named plaintiff as particularly shown by the assignments of error made by the plaintiff, which are presented and filed herewith and made a part of this petition.

WHEREFORE, said plaintiff, William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company, prays for the correction of said errors and a reversal of the judgment rendered in said cause in favor of the defendants and against the plaintiff for the costs of this suit, and that your Honor will grant and cause to be issued to the said Circuit Court of the United States for the Eastern District of Louisiana a writ of error returnable with the record and proceedings in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, as provided by law;

And your petitioner will ever pray, etc.

(Signed) William S. Lovell
as Trustee in Bankruptcy of
Knight, Yancey & Company,
By Percy, Benners & Burr
Dufour & Dufour
His Attorney.

In the United States Circuit Court, Eastern District of Louisiana.

WILLIAN S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY,
Plaintiff,

versus No. 13,839.

ISIDORE NEWMAN & SON, ET ALS.,
Defendants.

The Cotonificio Cantoni; The Contonificio Furter; The Manifattura Tosi; Gianoli Brothers; A. Bernocchi Brothers.
Intervenors.

The plaintiff in the above styled cause, having presented his petition for a writ of error to review the proceedings in said cause and the judgment heretofore rendered therein in favor of

the defendants and against the plaintiff, and having presented and filed with said petition his assignments of error, and having entered into bond as required by law for the prosecution of this said writ of error in the Circuit Court of Appeals for the Fifth Circuit, which said bond has been approved, both as to its amount, form and the sufficiency of its sureties,

IT IS ORDERED: That the said writ of error be and the same is hereby granted and allowed, returnable as provided for by law.

Dated at New Orleans, Louisiana, this 4 day of October, 1911.

(Signed) Rufus E. Foster,
Judge.

PLAINTIFF'S ASSIGNMENT OF ERRORS.

Filed October 4th, 1911.

In the United States Circuit Court, Eastern District of Louisiana.

WILLIAM S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY, BANKRUPT,

Plaintiff,

versus

No. 13,839

ISIDORE NEWMAN & SON ET ALS,

Defendants.

The Contonificio Cantoni; The Contonificio Furter; The Manifattura Tosi; Gianoli Brothers; A. Bernocchi Brothers.

Intervenors.

PLAINTIFF'S ASSIGNMENT OF ERRORS.

The Plaintiff, William S. Lovell, as Trustee in Bankruptcy of Knight, Yancey & Company, being about to ask for the granting

of a writ of error from the judgment of the Court for the defendant, entered on the trial of this cause, says that there is manifest error in the record for which this cause should be reversed by the Circuit Court of Appeals for the Fifth Circuit, to which said writ of error is returnable, and as error assigns the following:

1. The Court erred in admitting in evidence the matters and things set forth in the second paragraph of the stipulation or agreed statement of facts on which the case was tried, said second paragraph of said stipulation being in words and figures as follows, to-wit:

> "2. On or about the dates stated in Exhibits 1 to 8, attached hereto, the spinners agreed respectively to purchase from Knight, Yancey & Company, and Knight, Yancey & Company agreed to sell to the spinners respectively, the quantities of cotton stated in the attached documents numbered Exhibits 1 to 8, inclusive. Said agreements were negotiated and concluded through one Gino Gavirati, a cotton broker residing at Milan, Italy. The said documents Exhibits 1 to 8, inclusive are the original brokers memoranda of said contracts, and correctly state the terms thereof, translations thereof are attached as Exhibits 1-A to 8-A, both inclusive."

The substance of Exhibits 1 to 8 referred to in the second paragraph of said stipulation, being the agreements concluded between the spinners and Knight, Yancey & Company, through their broker, Gino Gavirati, is as follows:

On January 15, 1910, Knight, Yancey & Company, through said broker, agreed to sell to Gianoli Brothers, 200 bales of cotton.

On December 28, 1909, Knight, Yancey & Company, through their said broker, agreed to sell to Antonio Bernocchi & Bros. 300 bales of cotton.

On January 29, 1910, Knight, Yancey & Company, through their said broker, agreed to sell to Est. Manifattura Tosi 600 bales of cotton.

On January 15, 1910, Knight, Yancey & Company through their said broker, agreed to sell to Est. Manifattura Tosi 500 bales of cotton.

On January 12, 1910, Knight, Yancey & Company, through their said broker, agreed to sell to Est. Furter Cotton Mills 500 bales of cotton.

On December 15, 1909, Knight, Yancey & Company, through their said broker, agreed to sell to Est. Cantoni Cotton Mills 900 bales of cotton.

On January 13, 1910, Knight, Yancey & Company, through their said broker, agreed to sell to Est. Cantoni Cotton Mills 300 bales of cotton.

On January 25, 1910, Knight, Yancey & Company, through their said broker, agreed to sell to Est. Cantoni Cotton Mills 100 bales of cotton.

2. The Court erred in admitting in evidence, over the objection of plaintiff, the matters and things set forth and referred to in the third paragraph of the stipulation or agreed statement of facts on which the case was tried, which said third paragraph is in words and figures as follows, to-wit:

"3. On or about the dates indicated therein respectively, the firm of Knight, Yancey & Company, by or at the instance of John W. Knight, the managing partner of said firm made up and issued thirteen documents purporting to be bills of lading of the Southern Railway Company. Said documents were not, however, valid bills of lading of said Railway Company, but were signed by or at the instance of Knight, Yancey & Company acting through said John W. Knight, with the names of the agents of said Railway Company, by whom bills of lading are customarily signed at the points where said pretended bills of lading purported to have been issued. Said pretended bills of lading were made up on the blank forms in use by said Railway Company. Said pretended bills of lading are hereto attached and marked Exhibits 9 to 21 inclusive. No cotton was in fact received by said Railway Company as recited in said

pretended bills of lading. The statement in the last sentence is without prejudice to defendant's contention that the cotton received by the Railroad Company hereinafter referred to is referable to said pretended bills of lading."

The substance of the pretended bills of lading referred to in said third paragraph of said stipulation is as follows:

(a) A pretended bill of lading, purporting to be issued by the Southern Railway Company, calling for the carriage of 100 bales of cotton marked T S X S from Decatur, Alabama, to Genoa, Italy, dated January 21, 1910 and purporting to acknowledge the receipt of said cotton from Knight, Yancey & Company to be delivered to their order, notify Gino Gavirati.

(b) A pretended bill of lading, purporting to be issued by the Southern Railway Company, acknowledging the receipt of 100 bales of cotton from Knight, Yancey & Company marked T S S T, to be carried from Decatur, Alabama, to Genoa, Italy, and there delivered to shipper's order, notify Gino Gavirati. Said bill of lading purporting to be dated January 24, 1910.

(c) A pretended bill of lading, purporting to be issued by the Southern Railway Company, acknowledging the receipt from Knight, Yancey & Company of 100 bales of cotton marked P S E X, to be carried from Decatur, Alabama, to Genoa, Italy, and there delivered to shippers order notify Gino Gavirati, dated February 7, 1910.

(d) A pretended bill of lading, purporting to be issued by the Southern Railway Company, acknowledging the receipt from Knight, Yancey & Company of 100 bales of cotton marked S D O N, to be carried from Selma, Alabama, to Genoa, Italy, and there delivered to shippers order, notify Gino Gavirati, dated February 7, 1910.

(e) A pretended bill of lading, purporting to be issued by the Southern Railway Company, acknowledging the receipt from Knight, Yancey & Company of 100 bales of cotton marked T S C I, to be carried from Selma, Alabama to Genoa, Italy, and there delivered to shippers order, notify Gino Gavirati, dated February 7, 1910.

(f) A pretended bill of lading, purporting to be issued by the Southern Railway Company, acknowledging the receipt from Knight, Yancey & Company of 100 bales of cotton marked T S L L, to be carried from Decatur, Alabama, to Genoa, Italy, and there delivered to shippers order, notify Gino Gavirati, dated January 18, 1910.

(g) A pretended bill of lading, purporting to be issued by the Southern Railway Company, acknowledging the receipt from Knight, Yancey & Company of 100 bales of cotton marked T S C Z, to be carried from a point in Alabama, to Genoa, Italy, and there delivered to shippers order, notify Gino Gavirati, dated February 1, 1910.

(h) A pretended bill of lading, purporting to be issued by the Southern Railway Company, acknowledging the receipt from Knight, Yancey & Company of 100 bales of cotton marked T S P G, to be carried from Selma, Alabama, to Genoa, Italy, and there delivered to shippers order, notify Gino Gavirati, dated February 1, 1910.

(i) A pretended bill of lading, purporting to be issued by the Southern Railway Company, acknowledging the receipt from Knight, Yancey & Company of 100 bales of cotton marked T S I C, to be carried from Selma, Alabama, to Genoa, Italy, and there delivered to shippers order, notify Gino Gavirati, dated February, 1, 1910.

(j) A pretended bill of lading, purporting to be issued by the Southern Railway Company, acknowledging the receipt from Knight, Yancey & Company of 150 bales of cotton marked P S S I, to be carried from Decatur, Alabama, to Genoa, Italy, and there delivered to shippers order, notify Gino Gavirati, dated February 1, 1910.

(k) A pretended bill of lading, purporting to be issued by the Southern Railway Company, acknowledging the receipt from Knight, Yancey & Company of 150 bales of cotton marked Q S M P, to be carried from Decatur, Alabama, to Genoa, Italy, and there delivered to shippers order, notify Gino Gavirati, dated February 1, 1910.

(l) A pretended bill of lading, purporting to be issued by the Southern Railway Company, acknowledging the receipt from Knight, Yancey & Company of 100 bales of cotton marked T S A G, to be carried from Decatur, Alabama, to Genoa, Italy, and there delivered to shippers order, notify Gino Gavirati, dated January 20, 1910.

(m) A pretended bill of lading, purporting to be issued by the Southern Railway Company, acknowledging the receipt from Knight, Yancey & Company of 100 bales of cotton marked Q N E T, to be carried from Decatur, Alabama, to Genoa, Italy, and there delivered to shippers order, notify Gino Gavirati, dated January 31, 1910.

3. The Court erred in admitting in evidence, over the objection of the plaintiff, the matters and things set forth and referred to in the fourth paragraph of the stipulation or agreed statement of facts on which the case was tried, said paragraph being in the words and figures as follows, to-wit:

> "4. Thereupon Knight, Yancey & Company, acting by said John W. Knight, drew thirteen drafts on the bankers mentioned in said contracts of sale respectively, who were the bankers of the spinners respectively and were authorized to accept and pay the drafts to be drawn under said contracts of sale. Said drafts are hereto annexed and marked Exhibits 22 to 34 inclusive, and were drawn on the date which they bear, respectively."

The substance of the said drafts referred to in the fourth paragraph of said stipulation is as follows:

(a) A draft drawn by Knight, Yancey & Company on the Banca Commerciale Italiana, dated January 21, 1910, for £1458.5.9, to be charged to the account of 100 bales of cotton T S X S.

(b) A draft drawn by Knight, Yancey & Company on the Banca Commerciale Italiana, dated January 24, 1910, for £1454.2.9, to be charged to account of 100 bales of cotton T S S T.

(c) A draft drawn by Knight, Yancey & Company on the Banca Commerciale Italiana, dated February 7, 1910, for £1573.16.9, to be charged to account of 100 bales of cotton P S E X.

(d) A draft drawn by Knight, Yancey & Company on the Banca Commerciale Italiana, dated February 8, 1910, for £1547.5.0, to be charged to account of 100 bales of cotton S D O N.

(e) A draft drawn by Knight, Yancey & Company on the Banca Commerciale Italiana, dated February 8, 1910, for £1544.5.2, to be charged to the account of 100 bales of cotton T S C I.

(f) A draft drawn by Knight, Yancey & Company on the Banca Commerciale Italiana, dated January 18, 1910, for £1459.3.7, to be charged to the account of 100 bales of cotton T S L L.

(g) A draft drawn by Knight, Yancey & Company on the Banca Commerciale Italiana, dated February 2, 1910, for £1445.0.8m to be charged to the account of 100 bales of cotton T S C Z.

(h) A draft drawn by Knight, Yancey & Company on the Banca Commerciale Italiana, dated February 2, 1910, for £1451.3.9, to be charged to the account of 100 bales of cotton T S P G.

(i) A draft drawn by Knight, Yancey & Company on the Banca Commerciale Italiana, dated February 2, 1910, for £1448.10.5, to be charged to the acount of 100 bales of cotton T S I C.

(j) A draft drawn by Knight, Yancey & Company on Swiss Bankverein, dated February 1, 1910, for £2290.19.11, to be charged to the account of 150 bales of cotton P S S I.

(k) A draft drawn by Knight, Yancey & Company on Swiss Bankverein, dated February 1, 1910, for £2309.6.11, to be charged to the account of 150 bales of cotton Q S M P.

(l) A draft drawn by Knight, Yancey & Company on Fred. Huth & Co., dated January 20, 1910, for £1411.2.2, to be charged to the account of 100 bales of cotton T S A G.

(m) A draft drawn by Knight, Yancey & Company on Credito Italiana, dated January 31, 1910, for £1525.10.0, to be charged to the account of 100 bales of cotton Q N E T.

4 The Court erred in admitting in evidence over the objection of plaintiff, the matters and things set forth and referred to in the fifth paragraph of the stipulation or agreed statement of facts on which the case was tried, said fifth paragraph being in the words and figures as follows, to-wit:

> "5. Knight, Yancey & Company, acting through John W. Knight, thereupon attached said drafts to said pretended bills of lading respectively, and also attached thereto respectively the certificates of insurance which are hereto attached and marked Exhibits 35 to 46 inclusive, and the invoices which are hereto attached and marked Exhibits 47 to 58 inclusive."

Said certificate of insurance were all issued by the Atlantic Mutual Insurance Company and purport to insure each of the several lots of cotton set forth in the pretended bills of lading and to be issued on the dates of said pretended bills of lading and to insure cotton of the same marks as those purporting to be acknowledged as received in said pretended bills of lading.

(5) The court erred in admitting in evidence, over the objection of the plaintiff, the matters and things set forth in the sixth paragraph of the stipulation or agreed statement of facts on which the case was tried, which sixth paragraph is in the words and figures as follows, to-wit:

> "6. Knight, Yancey & Company acting through said John W. Knight, thereupon indorsed said drafts, pretended bills of lading and certificates of insurance in blank, and discounted said drafts, with the other documents mentioned above attached thereto respectively, with certain

bankers, and received and retained the proceeds of said drafts, which amounted to the face of said drafts, less discount."

6. The Court erred in admitting in evidence over the objection of the plaintiff, the matters and things set forth in the seventh paragraph of the stipulation or agreed statement of facts on which the case was tried, which seventh paragraph is in the words and figures as follows, to-wit:

"7. The purchasers of said drafts and attached documents, thereupon sent them forward through their correspondents to the respective drawees for acceptance, and the same were by them accepted on the dates indicated by the acceptances appearing on the face of said drafts and the said pretended bills of lading were thereupon delivered to the spinners respectively. The said drawees accepted the said drafts in good faith, and in reliance on the documents thereto attached, including the pretended bill of lading, which they and the spinners honestly believed to be genuine bills, representing goods actually shipped by carrier as therein stated. At the maturity of said drafts, they were paid in full by the respective drawees to the respective holders, and the said drawees have been duly reimbursed for said payments by the spinners respectively."

7. The Court erred in admitting in evidence the broker's memoranda of sales, being Exhibits 1-A to 8-A both inclusive, the same being executory contracts of sale made on behalf of Knight, Kancey & Company by their broker, Gino Gavirati to the several spinners on the lots of cotton therein referred to.

8. The Court erred in admitting in evidence, over the objection of the plaintiff, the pretended bills of lading Exhibits 9 to 21, both inclusive, which it was admitted were forgeries.

9. The Court erred in admitting in evidence, over the objection of the plaintiff, the drafts drawn by Knight, Yancey & Company, being Exhibits 22 to 34, both inclusive, the same being drafts to which were attached forged bills of lading, which drafts were accepted and paid and which were discounted on or about the dates they were drawn by Knight, Yancey & Company and approximately the amounts of money called for therein obtained by Knight, Yancey & Company.

10. The Court erred in admitting in evidence the certificates of insurance attached, together with the pretended bills of lading, to the drafts drawn by Knight, Yancey & Company, which purport to insure the several lots of cotton which said pretended bills of lading purport to acknowledge the receipt of.

11. The Court erred in admitting in evidence over the objection of the plaintiff, the invoices—Exhibits 47 to 58, both inclusive, which purport to be invoices of cotton shipped by Knight, Yancey & Company in the lots and of the marks purported to be called for by the pretended bills of lading.

12. The Court erred in refusing to find the facts to be as set forth in the agreed statement of facts on which the cause was tried, pursuant to the request made by the plaintiffs to that end.

13. The Court erred in refusing to make the following finding which it was requested in writing to make:

> "1. When Knight, Yancey & Company delivered the lots of cotton in question to the carriers at Decatur and Selma, respectively, Knight, Yancey & Company did not intend that title to said cotton should then pass to the spinners, Knight, Yancey & Company delivered their cotton, as declared in the stipulation, to the Railroad Companies, and received from the Railroad Companies bills of lading to shippers' order, thus retaining the jus disponendi. There is no proof that Knight Yancey & Company did intend that title should pass to the spinners, and, therefore, the Court finds as a fact that they did not so intend. The defendants failed to adduce proof to overcome the legal presumption."

14. The Court erred in refusing to make the following finding which it was requested by the plaintiff in writing to make:

"2. The shipments called for by the various contracts were for January and February, 1910, shipment. No shipments in point of fact were made in January and February, 1910. All of the shipments, as appears from the statement of facts, were made in April, 1910, with the exception of one shipment made in March, 1910. There is no proof in the record that the spinners consented to the modification of the contract for March-April shipment instead of January-February shipment, and, therefore, the Court finds as a fact that there was no mutual understanding to the change or modification of the contract in the particular aforementioned, and that, therefore, there was no delivery under the contract."

15. The Court erred in refusing to make the following finding which it was requested in writing by the plaintiff to make:

"3. The contracts in question were all c.i.f. contracts, that is costs, insurance and freight to be paid by the shippers. No insurance was taken out by Knight, Yancey & Company in favor of the spinners, or anybody else, when they delivered the actual cotton to the carriers; and therefore, when the cotton was delivered to the carrier, and at all times thereafter, same was not insured in favor of the spinners as provided for in their respective contracts. Said cotton was at the risk of Knight, Yancey & Company, who held the bills of lading therefor to shippers' order, and a portion of said cotton was in fact thereafter hypothecated by Knight, Yancey & Company for their debt."

16. The Court erred in overruling plaintiff's motion to find the facts as stipulated by the parties and as set forth in their

stipulation filed in the cause, and, upon such finding, to render judgment in favor of the plaintiff and against the defendants, Isidore Newman & Son and E. A. Neugass in the sum of $91,345.25.

17. The Court erred in making the following finding of fact:

"6. That by marking and shipping the said cotton as above set out, Knight, Yancey & Company intended to appropriate and did appropriate it to the fulfillment of the said eight contracts of sale, and that by delivering it to the carrier they perfected delivery to the buyers under the terms of the said contracts."

There was no evidence in the cause to support said finding of the Court.

18. The Court erred in making the following finding of fact.

"7. That Knight, Yancey & Company retained the genuine bills of lading for the said cotton in their own possession, and that it was their intention to suppress them and to allow the buyers to claim the cotton on the forged bills of lading attached to the drafts above mentioned."

There was no evidence in the cause which would support said finding.

19. The Court erred in making the following finding of fact:

"8. That all right, title and interest of Knight, Yancey & Company to the said 1400 bales of cotton had passed out of them and that they had no lien or claim of any kind upon it before their adjudication in bankruptcy."

Said finding was in conflict with the agreed statement of facts on which the cause was tried.

20. The Court erred in finding:

"9. That the Trustee has no right, title or interst in or two, or claim upon the said cotton of any nature whatsoever."

Said finding is a conflict with the uncontradicted evidence in the cause.

21. The Court erred in making the following finding:

"10. That Knight, Yancey & Company and their Trustee, plaintiff herein, are estopped to assert any right, title or interest in or to the said 1400 bales of cotton."

There is no evidence in the record which will support said finding.

22. The Court erred in overruling plaintiff's motion to set aside the findings of fact filed by it in the cause and to find that the Trustee had the right, title and interest in the cotton the subject matter of the suit, at the time that same was seized pursuant to the order of the District Court.

23. The Court erred in granting defendant's motion to enter judgment for the defendants for their costs.

WHEREFORE, the plaintiff, William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company, prays that the judgment of the Circuit Court for the Eastern District of Louisiana entered for the defendant in the above and foregoing styled cause be reversed, set aside and held for naught, and that judgment herein be by this Court entered for the plaintiff and against the defendants Isidore Newman & Son and E. A. Nougaa for Ninety-one Thousand, three hundred and forty-five and 25/100 Dollars ($91,345.25), with interest thereon

from May 3, 1910, or that this cause be remanded to said Circuit Court for the proceedings.

(Signed) Percy, Benners & Burr,
Dufour & Dufour
Attorneys for the plaintiff,

William S. Lovell as Trustee of
Knight, Yancey & Company,
Bankrupts.

The foregoing assignments of errors were presented and filed with the plaintiff's petition for a writ of error.
Oct. 4th, 1911.

(Signed) H. J. Carter,
Clerk.

By W. B. Donovan,
Deputy Clerk.

BOND FILED OCTOBER 4th 1911.

IN THE UNITED STATES CIRCUIT COURT EASTERN DISTRICT OF LOUISIANA.

WILLIAM S. LOVELL, Trustee of Knight, Yancey & Company, Bankrupt.
Plaintiff.

vs. No. 13,839.

ISIDORE NEWMAN & SON, ET ALS.
DEFENDANTS.

The Contonificio Cantoni; The Contonificio Furter; The Manifattura Tosi; Gianoli Brothers; A. Bernocchi Brothers.
Intervenors.

KNOW ALL MEN BY THESE PRESENTS: That we, WILLIAM S. LOVELL as Trustee in Bankruptcy of Knight, Yan-

cey & Company, and South Western Surety Insurance Co. are held and firmly bound unto ISIDORE NEWMAN & SON, E. A. NEUGASS,- TH. RUHNE, THE CONTONIFICIO CANTONI, THE CONTONIFICIO FURTER, THE MANIFATTURA TOSI, GIANOLI BROTHERS, and A. BERNOCCHI BROTHERS in the full and just sum of ONE THOUSAND DOLLARS ($1,000), for the payment of which well and truly to be made we bind ourselves, our heirs, executors, administrators and successors jointly and severally by these presents.

Signed with our hands and sealed with our seals this 4th day of October 1911.

THE CONDITION OF THIS BOND IS AS FOLLOWS:

WHEREAS, in the above filed cause, said William S. Lovell as Trustee in Bankruptcy of Knight, Yancey & Company has sued out a writ of error in the Circuit Court of Appeals of the United States for the Fifth Circuit, to review the proceedings in the said cause and the judgment rendered therein in favor of the defendants and against this plaintiff for costs, returnable as provided by law, which said writ of error has been granted and a copy thereof filed in the Clerk's office in said Court, and all things have been done by said plaintiff to obtain the review of the said proceedings and judgment by said Circuit Court of Appeals.

NOW, THE CONDITION OF THIS OBLIGATION IS SUCH:

That if the said William S. Lovell, as Trustee in Bankruptcy of Knight, Yancey & Company, should prosecute said writ of error to affect and pay all damages and costs if he fails to make his plea and writ of error good, or which any of the defendants in said cause, by the wrongful suing out of this writ of error may sustain, then this obligation shall be void; otherwise to remain in full force and effect.

(Signed) William S. Lovell,
as Trustee in Bankruptcy of
Knight, Yancey & Company
By Wm. C. Dufour,
His Attorney.

SOUTHWESTERN SURETY INSURANCE CO.,
(Seal) (Signed) By Jos Bayle
Atty. in fact.

Sealed and delivered in the presence of:

The foregoing bond is approved both as to form, amount and sufficiency of the sureties.

(Signed) Rufus E. Foster,
Judge.

STIPULATION FILED OCTOBER 4th, 1911.

IN THE UNITED STATES CIRCUIT COURT EASTERN DISTRICT OF LOUISIANA.

WILLIAM S. LOVELL, Trustee of Knight, Yancey & Company, Bankrupt.

Plaintiff.

vs. No. 13,839.

ISIDORE NEWMAN & SON, ET ALS.

Defendants.

The Contonificio Cantoni; The Contonificio Furter; The Manifattura Tosi; Gianoli Brothers; A. Bernocchi Brothers,

Intervenors.

In this cause it is agreed that the Clerk shall certify and transmit to the Clerk of the Circuit Court of Appeals, for the inspection of said Circuit Court of Appeals, on an appeal or writ of error taken in this case, the following original documents introduced in evidence on the trial of this case, to-wit:

The pretended bills of lading, being exhibits numbered 9 to 21, both inclusive; the drafts, being exhibits numbered 22 to

34, both inclusive; The insurance certificates being exhibits 35 to 46, both inclusive; the genuine bills of lading, being exhibits numbered 59 to 71, inclusive.

It is further agreed that the Court may make an order pursuant to Subdivision 4 of Rule 14 of the Rules of Practice of the Circuit Court of Appeals, for the transmission of said original papers.

(Signed) Dufour & Dufour,
Percy, Benners & Burr
Attorneys for Plaintiff.
" Wheeler, Cortiss & Haight,
" Dart, Kernan & Dart.
Attorneys for Defendants.

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PRAECIPE AS TO TRANSCRIPT, FILED Oct. 19, 1911.

UNITED STATES CIRCUIT COURT, EASTERN DISTRICT OF LOUISIANA, NEW ORLEANS DIVISION.

W. S. LOVELL, TRUSTEE OF KNIGHT, YANCEY & COMPANY

vs. No. 13,839.

ISIDORE NEWMAN & SON, ET AL.

To H. J. Carter, Esq.,

Clerk U. S. Circuit Court,

New Orleans, La.

In making up the transcript on writ of error in the above entitled and numbered cause, you will include therein the following, to-wit:-

Petition,
Citation and Marshal's Return thereon;
Exception and Prayer for Oyer,

Motion and Order fixing Exception for trial,
Hearing and Order maintaining Exception of vagueness, with leave to Plaintiff to amend;
Supplemental and Amended Petition and order,
Exception,
Waiver of Jury,
Hearing on Exception and submission,
Opinion of Court,
Order overruling Exception,
Motion and Order allowing Defendants 10 days to Answer,
Answer,
Case called, and fixed for trial,
Case called, Jury waived, hearing and submission,
Waiver of Jury,
Stipulation,
Note of Evidence,
Stipulation,
Intervention,
Answer of Plaintiff to Intervention,
Stipulation,
Plaintiff's request for Findings,
Defendant's request for Findings,
Exhibits 1 to 8 and 1 A to 8 A, inclusive,
Findings of Fact,
Opinion,
Judgment,
Order extending time for filing Bill of Exceptions,
Bill of Exceptions,
Petition and order for Writ of Error,
Assignment of Errors,
Bond for Writ of Error,
Stipulation.
Documents (original) to be taken up under stipulation and order of Court.

New Orleans, La., October 19th., 1911.

(Signed) Percy, Benners & Burr,

Dufour & Dufour,
Attorneys for Plaintiff.

## ORDER TO TRANSMIT CERTAIN DOCUMENTS IN THE ORIGINALS TO THE UNITED STATES CIRCUIT COURT OF APPEALS.

FILED OCTOBER 23RD., 1911.

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

WILLIAM S. LOVELL, Trustee of Knight, Yancey & Company, Bankrupt.

vs. No. 13,839.

Isidore Newman & Son, et als.

Considering the annexed Stipulation filed October 4th., 1911 and the Rule of the United States Circuit Court of Appeals, Number 14.

It is ordered that the Clerk of the Circuit Court for this District do transmit to the Clerk of the Circuit Court of Appeals for the inspection of the said Circuit Court of Appeals on the Writ of Error taken in this case, the following original documents introduced in evidence on the trial of said cause and described in the annexed agreement as follows, to-wit:-

"The pretended bills of lading, being exhibits numbered 9 to 21, both inclusive; the drafts, being exhibits numbered 22 to 34, both inclusive; The insurance certificates being exhibits 35 to 46 both inclusive; the genuine bills of lading, being exhibits numbered 59 to 71, inclusive.

(Signed) Rufus E. Foster,
Judge.

N. O. La., October 23rd., 1911.

And thereafter the following proceedings were had in said cause in said Circuit Court of Appeals.

*Motion and Order Fixing Case for Argument.*

United States Circuit Court of Appeals, Fifth Circuit.

No. —.

W. S. LOVELL, Trustee of Knight, Yancey & Company, Plaintiff in Error,

vs.

ISIDORE NEWMAN & SON et al., Defendant- in Error.

On motion of Percy, Benners & Burr and Dufour & Dufour, attorneys for plaintiff in error, and on suggesting to the Court that the transcript in this case has been filed and has been printed; and

On further suggesting to the Court that this is a cause involving property alleged to belong to the bankrupt estate and that it is desirable that the case be set for hearing at the earliest date practicable,

It is ordered: That this case be set down for argument in this Court on the 11th day of December, 1911.

O. K.
D. A. P.

The foregoing has the following indorsements to-wit: No. 2296. United States Circuit Court of Appeals, Fifth Circuit. W. S. Lovell, Trustee of Knight, Yancey & Company, Plaintiff in Error, vs. Isidore Newman & Son, et al., Defendant- in Error. Motion to fix case for argument. U. S. Circuit Court of Appeals. Filed Oct. 28, 1911. Charles H. Lednum, Clerk, Per Willie A. Teitelbaum, Deputy.

*Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Circuit Court of the United States in and for the Fifth Circuit, and holding Sessions for the Eastern District of Louisiana, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between William S. Lovell, Trustee of Knight, Yancey & Company, plaintiff in Error, and Isidore Newman & Son, E. A. Neugass, Th. Ruhne, The Contonificio Cantoni, The Contonificio Furter, The Manifattura Tosi, Gianoli Brothers and A. Bernocchi Brothers, defendants in Error, a manifest error hath happened, to the great damage of the said William S. Lovell, Trustee of Knight, Yancey & Company, plaintiff in error, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid, in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all the things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans within 30 days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held; that, the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of said Supreme Court of the United States, this 4th day of October in the year of our Lord one thousand nine hundred and eleven.

H. J. CARTER,
*Clerk of the United States Circuit Court for the Eastern District of Louisiana,*
By W. B. DONOVAN,
*Deputy Clerk.*

Allowed by
RUFUS E. FOSTER, *Judge.*

The foregoing has the following indorsements to-wit: United States Circuit Court. No. 13839. William S. Lovell, Trustee of Knight, Yancey & Co., Bankrupts, vs. Isidore Newman & Son, et al. Writ of Error. No. —. U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division. Filed Oct. 4, 1911. H. J. Carter, Clerk. W. B. Donovan, Dep. Clerk. No. 2296. U. S. Circuit Court of Appeals. Filed Oct. 28, 1911. Charles H. Lednum, Clerk, Per Willie A. Teitelbaum, Deputy.

*Citation.*

In the United States Circuit Court, Eastern District of Louisiana.

No. 13839. Bankruptcy.

WILLIAM S. LOVELL, Trustee of Knight, Yancey & Company, Plaintiff,

vs.

ISIDORE NEWMAN & SON et als., Defendants.

THE CONTONIFICIO CANTONI, THE CONTONIFICIO FURTER, THE MANIFATTURA TOSI, GIANOLI BROTHERS, A. BERNOCCHI BROTHERS, Intervenors.

President of the United States to Isidore Newman & Son, E. A. Neugass, Th. Ruhne, The Contonificio Cantoni, The Contonificio Furter, The Manifattura Tosi, Gianoli Brothers, and A. Bernocchi Brothers:

Whereas, William S. Lovell, as Trustee in Bankruptcy of Knight, Yancey & Company, has applied for and obtained a writ of error, returnable to the United States Circuit Court of Appeals for the Fifth Circuit, from the judgment heretofore entered in said cause in favor of the defendants and against the plaintiff and provided the sureties required by law and has done all the other things required to obtain the review of said proceedings and of said judgment from the Circuit Court of Appeals, you and each of you are hereby cited and required to appear before the said United States Circuit Court of Appeals for the Fifth Circuit, at the City of New Orleans, Louisiana, at the place of the holding of Court, at the time provided for by law, and show cause, if any there be, why speedy justice should not be done in the premises.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 4th day of October in the year of our Lord one thousand nine hundred and eleven.

RUFUS E. FOSTER, *Judge.*

Service of the foregoing citation is hereby accepted and further notice of the suing out of the writ of error above referred to is hereby waived.

This 4th day of October, 1911.

WHEELER, CORTIS & HAIGHT,
DART, KERNAN & DART,
*Attorneys for the Defendants and Interveners in the Above Styled Cause.*

The foregoing has the following indorsements to-wit: No. 13839. United States Circuit Court Eastern District of Louisiana, New Orleans Division. William S. Lovell, Trustee of Knight, Yancey & Company, Bankrupt, vs. Isidore Newman & Son, et als. Citation.

No. —. U. S. Circuit Court, Eastern District of Louisiana, New Orleans Division. Filed Oct. 4, 1911. H. J. Carter, Clerk, W. B. Donovan, Dep. Clerk. No. 2296. U. S. Circuit Court of Appeals. Filed Oct. 28, 1911. Charles H. Lednum, Clerk, Per Willie A. Teitelbaum, Deputy.

*Argument and Submission.*

No. 2296.

WILLIAM S. LOVELL, Trustee,
vs.
ISIDORE NEWMAN & SON et al.

DEC. 11, 1911.

On this day this cause was regularly called, and after argument by H. G. Dufour, Esq., for plaintiff in error, and John W. Griffin, Esq., for defendants in error, was continued till tomorrow.

No. 2296.

WILLIAM S. LOVELL, Trustee,
vs.
ISIDORE NEWMAN & SON et al.

DEC. 12, 1911.

On this day this cause was called for further hearing, and after argument by John W. Griffin, Esq., for defendants in error, and W. A. Blount, Esq., for plaintiff in error, was submitted to the court.

*Opinion.*

United States Circuit Court of Appeals, Fifth Circuit.

Number 2296.

WILLIAM S. LOVELL, Trustee,
vs.
ISIDORE NEWMAN & SON, GIANOLI BROTHERS et al.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

It appears from the record that Knight, Yancey & Company, who had been for several years largely engaged in exporting cotton from the United States, were adjudicated bankrupts April 20, 1910. On the day following receivers were appointed, who, being thereunto duly authorized, instituted proceedings May 3, 1910, to restrain the removal from the jurisdiction of the Court of 1310 bales of cotton.

At that time the cotton was aboard the steamship Ingelfingen at New Orleans en route to Italy. On May 6, 1910, an order for a temporary injunction was passed by the Court, but it was therein provided that the cotton might be removed upon the execution of a bond by the defendant-, conditioned to pay to the receivers of Knight, Yancey & Company, or to a trustee thereafter to be appointed, the cash value of the cotton if it should be adjudged that they had title to the same. The bond was filed by the Master of the ship with Isidore Newman & Company as sureties, and the cotton was transported to its destination and delivered to the Italian spinners, who have intervened in this proceeding. This suit was brought by the trustee in bankruptcy of Knight, Yancey & Company upon the bond thus executed and the following named parties were permitted to intervene as claimants of the cotton, to-wit: The Cantonificio Cantoni, The Cantonificio Furter, The Manifattura Tosi, all Italian corporations, Gianoli Brothers and Bernocchi Brothers, the two last named being partnerships and citizens of Italy.

The essential facts may be summarized as follows: Knight, Yancey & Company, through Gino Gavirati, a cotton broker of Milan, Italy, made eight certain contracts with the interveners, bearing date in December, 1909 and January, 1910. They provided for the shipment by Knight, Yancey & Company of specified quantities of cotton of specified grades under through bills of lading to Genoa, Italy, via the Cotoniera Steamship Line. The interveners were to pay for the cotton at fixed prices by means of drafts to be drawn by Knight, Yancey & Company on certain bankers designated in the contracts at 90 or 180 days' sight. The cotton was to be shipped during January and February, 1910, and by the terms of the contracts it was the duty of Knight, Yancey & Company to pay the insurance and freight. At the time fixed in the contracts, Knight, Yancey & Company drew on the designated bankers drafts for the contract price of the cotton. To each draft was attached an invoice; and each invoice referred by date to the contract under which the sale was made; bore the name of the purchasing spinners, and stated the purchase price, computed as provided in the contract. Knight, Yancey & Company then attached to each draft and invoice what purported to be a bill of lading of the Southern Railway Company, drawn in accordance with the terms of the contract and consigning the cotton which it purported to cover through to Genoa. These bills of lading, which were in fact forgeries, ran to the order of the shipper and contained a direction to notify Gino Gavirati, the Italian broker through whom, as before stated, the contracts of sale had been concluded. A certificate of insurance was also attached to each set of documents, and by its terms the loss, if any, was payable to the endorsee of the certificate. The bills of lading, the drafts, the invoices and the certificates each contained certain identifying marks—a combination of four letters with which they represented the cotton was marked. No cotton was shipped when Knight, Yancey & Company issued the forged bills of lading and other documents mentioned. The drafts were thereupon sold by Knight, Yancey & Company at their face value, less discount: and the drafts, bills of lading and insurance cer-

tificates were endorsed in blank by them, and, still fastened togetner, were delivered to the discounting bank. The documents were then sent forward through the correspondents of the discounting bank to the bankers on whom the drafts were drawn. These bankers, who were duly authorized by the interveners, and who, like the interveners, honestly believed that the bills of lading were genuine and that the documents represented cotton actually shipped, accepted the drafts and thereupon the bills of lading were delivered to the interveners. The drafts were duly paid by the bank, which were reimbursed by the respective interveners. The result of the transaction was that Knight, Yancey & Company received payment under the contracts without having shipped the cotton.

Thereafter Knight, Yancey & Company, at various dates between March 16 and April 11, 1910, actually shipped the cotton called for by the contracts, and obtained therefor genuine bills of lading. The cotton so shipped bore the same identifying marks as that described in the forged bills, invoices, drafts and insurance certificates and it was of the same grades and quantities called for by the contracts. The genuine bills of lading were practically duplicates of the forged bills, save as to dates. The genuine bills were, and the spurious ones purported to be, executed by railroad agents at Decatur and Selma Alabama. In the case of the Decatur shipments, Knight, Yancey & Company retained in their possession the genuine bills of lading unindorsed for some six weeks. It appears from the record that the receivers were unable to obtain possession of the bills, but those representing the Decatur shipments, after remaining in possession of Knight, Yancey & Company for the period of time above mentioned, were delivered to the trustee endorsed in blank on May 26, 1910. Touching the Selma shipments, the facts are somewhat different. It appears that the main office of Knight, Yancey & Company was at Decatur, but they had another at Selma. The Selma bills were received by the duly authorized agent of Knight, Yancey & Company at Selma from the railway Company and were thereafter by him endorsed for Knight, Yancey & Company and hypothecated with a bank in Selma as collateral security for advances of money made by it to Knight, Yancey & Company. The agent then attached the bills to negotiable drafts drawn by him on Knight, Yancey & Company, at Decatur, in favor of the Selma Bank, for sums of money approximating the value of the cotton covered by the bills of lading. The drafts were duly accepted by Knight, Yancey & Company and the bills of lading were delivered to them on April 16, 1910, freed from any claim on the part of the bank. Knight, Yancey & Company retained the Selma bills also until the appointment of the trustee, when they were delivered to him.

It may be added that the individual estates of the partners, composing the firm of Knight, Yancey & Company, taken in connection with the estate of the partnership, are not sufficient to pay the claims which have been proved in bankruptcy against the partnership.

No insurance was obtained on the cotton when it was actually

shipped, and the only insurance, effected in connection with the contracts between the parties, was that evidenced by the certificates hereinbefore referred to, which were attached to the drafts and spurious bills of lading when the drafts were paid.

A jury having been waived in the Court below, the cause was heard upon an agreed statement of facts. Upon the findings of fact filed by the Court judgment was rendered in favor of the defendants and interveners, to which exceptions were duly taken by the Trustee, who prosecutes a writ of error to review the judgment.

For the plaintiff in error: William A. Blount, A. C. Blount, Jr., F. B. Carter, Dufour & Dufour, and Percy, Benners and Burr.

For the defendants in error: John W. Griffin, Haight, Sandford & Smith and Dart, Kernan & Dart.

Before Pardee and McCormick, Circuit Judges, and Maxey, District Judge.

MAXEY, *District Judge:*

Upon the trial of the case, a jury was waived by written stipulation of the parties and the cause was submitted to the Court upon an agreed statement of facts. The Court, accepting such agreed statements as a basis, filed its findings of the ultimate facts and rendered judgment in favor of the defendants and interveners, thus in effect holding that the spinners (#) were the owners of the cotton at the date of the adjudication of bankruptcy, to-wit: April 20, 1910. The trustee excepted to the judgment rendered, and insists that at the date mentioned the title to the cotton was in the bankrupts, and by operation of law it became vested eo instanti in him as the trustee of their estate. The question thus suggested is the vital one submitted for decision. If the spinners were the true owners of the cotton, the judgment was right, and e converso, if the trustee was the owner it was erroneous and should be reversed.

Before entering upon an examination of the real question involved and in order to ab-reviate the discussion, it may be well to state a few of the recognized and well established principles of law which have been referred to and elaborated by counsel in their briefs.

1. In mercantile contracts time is of the essence. A statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded a condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the contract. Norrington v. Wright, 115 U. S., 188; Pope v. Allis, 115 U. S., 363; Jones v. United States, 96 U. S. 24.

2. If a party intend to repudiate or rescind a contract because of the failure of the other party to perform it, he should give clear notice of his intention to do so, unless the contract itself dispenses

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#NOTE.—For the sake of brevity the plaintiff in error will be referred to as "the trustee", the cotton buyers or the interveners as "the spinners" and Knight, Yancey & Company as "the bankrupts."

with such notice, or unless notice becomes unnecessary by reason of the conduct of the parties. Hennessy v. Bacon, 137 U. S., 84.

3. A bill of lading unexplained is almost conclusive evidence of an intention to reserve to the shipper the jus disponendi of the property. Davis v. National Exchange Bank, 91 U. S., 618. While the transfer of a bill passes to the transferee the transfer-or's title to the goods described, yet the presumption as to ownership arising from the bill may be explained or rebutted by other evidence showing where the real ownership lies. A pledgee to whom a bill of lading is given as security gets the legal title to the goods and the right of possession only if such is the intention of the parties, and that intention is open to explanation. Inquiry into the transaction in which the bill originated is not precluded because it came into the hands of persons who may have innocently paid value for it. The Carlos F. Roses, 177 U. S., 655.

4. A trustee of the estate of a bankrupt, upon his appointment and qualification, is vested by operation of law with the title to property of the bankrupt as of the date of the adjudication.

Recurring to the crucial question submitted for consideration, that is, the true ownership of the cotton, it becomes necessary, for its proper determination, to carefully analyze the facts. The transactions, eventuating in the present litigation, originated in contracts made December, 1909 and January, 1910 by the bankrupts, through their broker Gavirati, with the spinners for the purchase and delivery of certain cotton. The validity of the contracts is not questioned. They called for the shipment by the bankrupts of specified quantities of cotton of specified grades under through bills of lading to Genoa. The cotton was to be shipped in January and February, 1910. Insurance and freight were to be paid by the bankrupts, and the spinners were to make payment of the cotton by means of drafts to be drawn on certain designated bankers. No cotton was shipped by the bankrupts during the months of January and February. They, however, drew drafts on the bankers designated in the contracts for the price of the cotton and attached certificates of insurance, invoices and forged bills of lading purporting to have been issued by the railroad company. By referring to the statement of the case it will be seen that these bills of lading, concocted by John W. Knight as the managing partner of the firm, were issued pursuant to the directions of the contract, and that the bills, the drafts, the certificates of insurance and the invoices, identified the cotton purporting to have been shipped, by certain marks composed of four letters. For example, one set of documents, including the draft, referred to cotton marked TSST, and so with the others, each set denoting a like combination but with different letters. It will be further noticed that there was a substantial correspondence in all of these documents, thus clearly showing that it was the deliberate purpose of the bankrupts to obtain money from the spinners by the fraudulent artifice thus devised. And this purpose was fully accomplished. The drafts were duly paid by the bankers of the spinners and the forged bills of lading were surrendered to the latter. The result was that the bankrupts obtained the

money and the spinners got the spurious bills of lading. In so far as the spinners and their bankers were concerned in the transcation their conduct was perfectly honest and straightforward. Relying upon the good faith of the bankrupts they acted upon the presumption that the bills of lading were genuine; they were ignorant of the fraud perpetrated upon them and paid the drafts in the assurance that the cotton had been shipped in compliance with the terms of their contracts and as indicated in the bills of lading.

What then occurred? After the bankrupts had received pay for the cotton, supposed by the shippers to be en route to its destination, the bankrupts in March and April—from March 16 to April 11,—a few weeks only after it should have been shipped under their contracts, made shipment of 1400 bales via the Cotoniera Steamship Line to Genoa. For these shipments genuine through bills of lading were obtained from the railroad company at Decatur and Selma, Alabama, and the cotton was transported to New Orleans and there delivered to and put aboard the steamship Ingelfingen of the Cotoniera Line. The cotton was delivered to the steamship and taken aboard prior to the date of the restraining order, to-wit: May 3, 1910. In this connection a comparison of the forged with the genuine bills of lading will prove instructive. In both the cotton was to be shipped by the Cotoniera Line to Genoa; in both the marks of the cotton were identical; in both Gavirati, the broker, was to be notified; in both the same weights precisely were inserted; in both the forms used by the railroad company were similar, and the genuine bills were issued by the same agent whose name was used in the forged bills. It is evident there was a purpose to conform the genuine bills to those that were forged. What were the purpose and intent actuating the bankrupts? They knew that the forged bills had gone forward and were presumably in the possession of the spinners, since the drafts had been paid and they had received the money. They knew that the genuine bills, so carefully designed to correspond with those that were spurious, would not be necessary to insure the delivery of the cotton to the spinners. And with this knowledge their plain purpose was to suppress the genuine bills and permit the cotton to proceed to its destination under the forged bills, and thus prevent exposure of the fraud with consequences disastrous to themselves. In view of these facts who were the real owners of the cotton?

It is insisted by the trustee that since the genuine bills of lading were made to the order of the bankrupts, they regained the title to and the jus disponendi of the cotton. It is true that the bills were executed as claimed and that they were endorsed in blank and delivered to the trustee on May 26. But on April 16, the bills were all in possession of the bankrupts and unindorsed. The cotton had then, at the date last mentioned, been delivered to the railroad company under through bills of lading for transportation to Genoa. At that date in whom did the title reside? The trustee answers in the bankrupts, by virtue of the bills of lading executed to their order and remaining in their possession. But we have seen that, while a bill of lading is strong evidence of an intention to reserve to the ship-

per the jus disponendi of the property, yet such intention is always open to explanation although the bill may have pased into the hands of an innocent purchaser for value. In the present case there are no intervening rights of third parties, the contest being between the bankruots and their trustee on the one hand and the spinners on the other. In the absence of the bankruptcy of the parties what would have been the attitude of the bankrupts? Could they have recovered the cotton or its value from the spinners? They had once been paid full value and it would be shocking to the sense of justice to suppose that they could have enforced a second payment. If parties by their own fraudulent conduct may be estopped, the application of the dictrine would effectually cut them off from asserting that they had not delivered the cotton in pursuance of their solemn contracts. But we may go further. We are clearly of the opinion that, under the facts of this case, the delivery of the cotton to the carrier vested the ownership in the spinners, upon the theory that it was the intention of the bankrupts to appropriate it to the contracts. The court below properly so held in the following finding:

"That by marking and shipping the cotton, as above set out, Knight, Yancey & Company intended to appropriate and did appropriate it to the fulfillment of the eight contracts of sale, and that by delivering it to the carrier they perfected delivery to the buyers under the terms of the contracts."

The case of Idaho, 93 U. S., 575, upon this question is pertinent and material. To a proper understanding of the case it becomes necessary to insert the following lengthy excerpt from the opinion. At pages 581-583 it is said by the Court:

"Recurring, then, to the inquiry whether Porter & Co.—to whose order the steamer delivered the one hundred and sixty-five bales of cotton—were the true owners of the cotton, a brief statement of the evidence on which their title rests is necessary. It originated as follows: On the 1st of April, 1869, one J. C. Forbes obtained from the master of the brig "Colson", then lying at New Orleans, a bill of lading for one hundred and thirty-nine bales of cotton, described by specified marks. The bill was indorsed, and forwarded by Forbes to Porter & Co., and drafts against it to a large amount were drawn upon them, which they accepted, credited, and paid on or before the 7th of the month. In fact, however, when the bill of lading was given, no such cotton had been received by the brig; but on the 5th of April the agent of Forbes bought one hundred and forty bales, then at the shipper's press, and directed them to be sent to the "Colson," marked substantially as described in the bill of lading. These bales were accordingly delivered from the press to the brig on the 8th of April, and the first and second mate receipted for them. They were not actually taken on board, but they were deposited on the pier, at the usual and ordinary place for the receipt of freight by the "Colson", and an additional bill of lading for one bale only was taken by Forbes, and by him indorsed and transmitted to Porter & Co., together with an invoice of the one hundred and forty bales corresponding with the bills of lading. The marks and numbers on the bales were the same as those mentioned in the

bills of lading, excepting only that thirty-five were marked L instead of thirty-six, and sixteen marked S instead of fifteen. There was also a small difference in the aggregate weight.

That the cotton thus delivered to the "Colson" was intended to fill the bills of lading, one of which had been previously given, is incontrovertible. They were so intended by the shipper. If not, why were they thus marked? And why was a bill of lading taken for one bale only, instead of one hundred and forty; and why was the invoice of the whole number sent? Such, also, was plainly the understanding of the ship. The receipts of the mates, and the fact that the master gave a bill of lading for one bale marked S, where there were sixteen bales thus marked, leave this beyond a reasonable doubt. What then? Why, the one hundred and forty bales thus shipped became from the moment of shipment the property of Porter & Co., to whom the bills of lading were indorsed. It is not only the utterance of common honesty, but the declaration of judicial tribunals, that a delivery of goods to a ship corresponding in substance with a bill of lading given previously, if intended and received to meet the bill of lading, makes the bill operative from the time of such delivery. At that instant it becomes evidence of the ownership of the goods. Thus in Rowley v. Bigelow, 12 Pick. 307, it is said a bill of lading operates by way of estoppel against the master, and also against the shipper and indorser. 'The bill acknowledges the goods to be on board before the bill of lading is signed. But if, through inadvertence or otherwise, the bill, of lading is signed before the goods are on board, upon the faith and assurance that they are at hand, as if they are received on the wharf ready to be shipped, or in the shipper's own warehouse * * * and afterwards they are placed on board, as and for the goods embraced in the bill of lading, as against the shipper and master the bill will operate on those goods by way of relation and estoppel. Such is also the doctrine asserted in Halliday v. Hamilton, 11 Wall. 565, and it is in harmony with the general rules that regulate the transfer of personal property. We do not say that a title to personal property may not be created between the issue of a bill of lading therefor and its delivery to the ship, which will prevail over the master's bill, but, in the absence of any such intervening right, a bill of lading does cover goods subsequently delivered and received to fill it, and will represent the ownership of the goods. The cotton delivered on the 8th of April on the pier for the "Colson", and received by the mates of the brig, became, therefore, at the instant of its delivery, the property of Porter & Co., who were then the indorsees of the bills of lading. Its subsequent removal by Forbes to the "Ladonia" either with or without the consent of the brig's officers, could not divert that ownership."

As in the Idaho case the delivery of the cotton to the Colson was intended to fill the bills of lading, although the delivery was made several days subsequent to the execution of the bills, so in the present case, where all the facts and circumstances are considered, the conclusion is evident that the bankrupt intended, by the delivery of the cotton to the carrier, to appropriate it to the contracts of the spinners. Indeed, any other conclusion would not only be inconsistent

with the facts, but repugnant to the principles of common honesty and fair dealing as between merchant and merchant.

But it is contended by the trustee that the delivery was ineffective to pass title for the reason, among others, that there was no proof of assent on the part of the spinners. The contention is answered by the Court in the case of Grove v. Brien, 8 How., Page 439, where it is said: "In the absence of all evidence to the contrary in case of an absolute assignment of property by a debtor to his creditors for the purpose of securing a pre-existing debt, an assent will be presumed on account of the benefit that he is to derive from it. This principle was recognized and applied by this court in the case of Tompkins v. Wheeler, 16 Pet., 106, and had been before in Bank v. Marbury, 11 Wheat. 96. No expression of assent, the Court say, of the person for whose benefit the assignment is made is necessary to the vesting the title, as the creditor is rarely unwilling to receive his debt from any hand that will pay him." There is nothing in the present record rebutting or tending to rebut, such presumption in favor of the spinners. On the contrary it appears that, when the temporary injunction was issued at the instance of the receivers, the steamship line promptly gave bond, by virtue of which the cotton was immediately transported under the bills of lading, to Genoa for delivery to the spinners. In addition, upon the institution of the present suit by the trustee, the spinners filed their petition of intervention, in which it is insisted that they are the owners of the cotton, and were such owners prior to the date of the restraining order. In view of the circumstances of the case the presumption must obtain that the spinners assented to the delivery of the cotton.

If in such case assent of the spinners to the delivery of the cotton would be presumed, they would be equally presumed to have waived the time of the delivery as well as the failure of the bankrupts to have it insured. Certainly the bankrupts would not be in a position to deny there was a waiver, and in that respect the trustee can claim no right superior to that of the bankrupts themselves.

While creditors are entitled to the protecting shield of the law, the rights of innocent purchasers are guarded and protected with equal jealousy. Under some circumstances the bankruptcy statute clothe the trustee with power to set aside conveyances, good as between the bankrupt and a purchaser. But ordinarily, in the absence of fraud, or of a state statute declaring the conveyance void, or unless it contravenes some provision of the bankruptcy acts, a conveyance, based upon a valuable consideration and good as between the parties, will be permitted to stand. As to such a conveyance, and the spinners here stand in a similar category, the trustee occupies no better position than the bankrupt. He stands simply in the bankrupt's shoes. The principle has been clearly announced by the Supreme Court in the following cases: Thompson v. Fairbanks 196 U. S. 516; Hewit v. Berlin Machine Works, 194 U. S., 296; Zartman v. First National Bank, 216 U. S., 134; York Manufacturing Co. v. Cassell, 201 U. S., 344:

Thus it was said by the Court in the York Manufacturing Co. case, 201 U. S., at page 352:

"Under the provisions of the bankrupt act the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. At that time the right, as between the bankrupt and the York Manufacturing Company, was in the latter company to take the machinery on account of default in the payment therefor. The Trustee under such circumstances stands simply in the shoes of the bankrupt and as between them he has no greater right than the bankrupt. This is held in Hewit v. Berlin Machine Works, 194 U. S., 296. The same view was taken in Thompson v. Fairbanks, 196 U. S., 516. It was there stated that 'under the present bankrupt act, the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt.'"

In the case of Zartman, 216 U. S., at page 138, Mr. Chief Justice Fuller, as the organ of the Court, used the following language:

"The position of the trustee in bankruptcy seems to be that the mistake made by Bacon in dictating or writing out the contract between himself and the Waterloo Bank 'is an assent in his hands as part of the estate of the bankrupt,' but we cannot agree to that. The trustee claims that he takes the same kind of title as a bona fide purchaser for value, but the rule applicable to this and all similar cases is that the trustee takes the property of the bankrupt, not as an innocent purchaser, but as the debtor had it at the time of the petition, subject to all valid claims, liens and equities. Thompson v. Fairbanks, 196 U. S., 516, and cases cited."

Bearing in mind the distinction we have noted, a perusal of Knapp v. Milwaukee Trust Co., 216 U. S., 545; Security Warehousing Co. v. Hand, 206 U. S., 415, and other cases of like type, relied upon by the Trustee, will demonstrate their inapplicability to the facts involved in the present controversy. To illustrate: The Knapp case involved the validity of a mortgage, which contained provisions rendering it, under the laws of Wisconsin, fraudulent in law and void as to creditors. The Court held that the Bankruptcy Act authorized the trustee to attack such a conveyance. But, referring to the case of the Security Warehousing Company, the Court in the Knapp case observed:

"The principle *were* recognized that the trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands is subject to the equities impressed upon it while in the hands of the bankrupt. 216 U. S., 557.

The cotton in question prior to the date that Knight, Yancey & Company were adjudged bankrupts was the property of the spinners, and, hence, it could not have been lawfully transferred by the bankrupts, nor was it subject to levy and sale under judicial process against them.

Without special reference to the assignments of error we have considered all material questions arising in the case, and for the reasons stated we are of the opinion that the judgment should be affirmed. It is so ordered.

(Original filed January 2, 1912.)

*Final Judgment.*

No. 2296.

WILLIAM S. LOVELL, Trustee,
vs.
ISIDORE NEWMAN & SON et al.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Louisiana, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby, affirmed.

It is further ordered that the plaintiff in error, William S. Lovell, as Trustee in Bankruptcy of Knight, Yancey & Company, and the surety on the writ of error bond herein, Southwestern Surety Insurance Company, be condemned to pay the costs of this cause in this court, in due course of the administration of the estate of said Knight, Yancey & Company, bankrupt-.

Jan. 2, 1912.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2296.

WILLIAM S. LOVELL, Trustee in Bankruptcy of Knight, Yancey and Company, Plaintiff in Error,
versus
ISIDORE NEWMAN AND SON et als., Defendant- in Error.

*Petition for Rehearing.*

W. A. Blount, Augustus Benners, William C. Dufour, H. Generes Dufour, Attorneys for Plaintiff in Error.

U. S. Circuit Court of Appeals. Filed Jan. 16, 1912. Frank H. Mortimer, Clerk.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2296.

WILLIAM S. LOVELL, Trustee in Bankruptcy of Knight, Yancey and Company, Plaintiff in Error,
versus
ISIDORE NEWMAN AND SON et als., Defendant- in Error.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit:

The petition for re-hearing of W. S. Lovell, Trustee in Bankruptcy of Knight, Yancey and Company, plaintiff in error herein, with respect shows:

That there is error to petitioner's prejudice in the opinion and judgment of this Court rendered in this cause on the second day of January, 1912, in the following particulars, to-wit:

1. That the Court erred in holding that the title to the cotton passed out of Knight, Yancey and Company and into the Italian spinners prior to the adjudication in bankruptcy.

2. That the Court erred in holding that the delivery of the cotton to the carrier during the latter part of March and the first half of April, 1910, was and constituted an appropriation by Knight, Yancey and Company to the contracts of purchase between Knight, Yancey and Company and the Italian spinners.

3. That the Court erred in holding that the delivery of the actual cotton by Knight, Yancey and Company to the carrier, at a time materially different from and long after the time provided for in the contracts, was an appropriation and delivery under the terms of the contracts.

4. That the Court erred in holding that the title to the cotton passed by appropriation to the contracts, notwithstanding the failure of Knight, Yancey and Company to effect insurance as stipulated in and required by the contracts.

5. That the Court erred in holding that title to the cotton passed from Knight, Yancey and Company to the spinners, notwithstanding the failure of Knight, Yancey and Company to obtain and deliver to the spinners, in accordance with the requirements of the contracts, Liverpool Conference bills of lading.

6. That the Court erred in holding that there was evidence sufficient to overcome the almost conclusive legal presumption that the shipper intended to retain the jus disponendi by the *taking* of bills of lading to shipper's order.

7. That the Court erred in holding that Knight, Yancey and Company would have been estopped from asserting that title had not passed, and, in any event, that the trustee of Knight, Yancey and Company was estopped from asserting that title, as to him and as to creditors, had not passed.

8. That the Court erred in holding that, as to this property, the trustee stood in the shoes of Knight, Yancey and Company, and could claim or assert no rights which Knight, Yancey and Company themselves could not have claimed or asserted.

9. That the Court erred in holding that the spinners were presumed to have accepted the delivery which Knight, Yancey and Company made to the carrier under conditions materially varying in essential particulars from the contracts, on the ground that said delivery, notwithstanding said material variations and differences, was of advantage and benefit to the spinners in view of the subsequent bankruptcy of Knight, Yancey and Company.

10. That the Court, having held that there was an appropriation of the cotton to the contracts, erred in holding that any acceptance by the spinners was necessary, for the reason that if there had been an appropriation under the contracts no acceptance would have been required, and, if there had been no appropriation under the contract-,

then the acceptance would not have been of avail in view of the fact that bankruptcy had intervened.

11. That the Court erred in holding that the acts of the spinners after the adjudication in bankruptcy *was* or could be of avail in affecting title to the property, or in changing the status as effected and established by the adjudication in bankruptcy.

12. That the Court erred in holding that the spinners had actually purchased the particular cotton in question and that they were to be considered as bona fide purchasers for value.

13. That the Court erred in holding that the bankrupts knew or were authorized and justified in believing that the genuine bills of lading would not be necessary to insure delivery of the cotton to the spinners by the carriers.

14. That the Court erred in holding that Knight, Yancey and Company by delivering, under the facts and circumstances of the case, the cotton to the carrier intended to convey the title to the spinners, or that by such delivery, title was in fact or in law conveyed to the spinners as against the trustee.

15. That the Court erred in not reversing the judgment of the Circuit Court and in not rendering judgment for plaintiff in error.

Wherefore, the premises considered, petitioner prays that a rehearing may be granted in this cause; and for such other and further relief as in law and in justice he may be entitled.

And he shall ever so pray.

W. A. BLOUNT,
AUGUSTUS BENNERS,
WILLIAM C. DUFOUR,
H. GENERES DUFOUR,
*Attorneys for Plaintiff in Error.*

New Orleans, January 9th, 1911.

I believe the foregoing application to be well founded in law; it is filed in good faith and not for the purpose of delay.

H. GENERES DUFOUR,
*Of Counsel.*

*Order Denying Rehearing.*

No. 2296.

WILLIAM S. LOVELL, Trustee,
vs.
ISIDORE NEWMAN & SON et al.

FEB. 6, 1912.

Ordered that the petition for rehearing filed in this cause be, and the same is hereby, denied.

*Petition for Writ of Error.*

United States Circuit Court of Appeals, Fifth Circuit.

No. 2296.

WILLIAM S. LOVELL, Trustee in Bankruptcy of Knight, Yancey & Company, Plaintiff in Error,
versus
ISIDORE NEWMAN & SON et als., GIANOLI BROTHERS et als., Defendants in Error.

Petition for Writ of Error.

Your petitioner, William S. Lovell, Trustee in Bankruptcy of Knight, Yancey & Company, plaintiff in error in the above entitled case, respectfully shows that the above entitled cause is now pending in the United States Circuit Court of Appeals, for the Fifth Circuit, and that a judgment therein has been rendered on the Second day of January, 1912, affirming a judgment of the Circuit Court of the United States, for the Eastern District of Louisiana;

That the matter in controversy in said suit exceeds the amount of One Thousand Dollars ($1,000), besides interest and costs and that the jurisdiction of none of the above Courts is, or was, dependent upon the opposite parties to the said suit or controversy, being aliens and citizens of the United States, or citizens of the different states; and that said cause does not arise under the Patent Laws, nor the copyright laws, nor the Revenue Laws, nor the Criminal Laws of the United States, and that it is not an Admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error.

Wherefore your petitioner respectfully prays that a writ of error be allowed in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignments of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

WILLIAM S. LOVELL,
*Trustee in Bankruptcy of Knight, Yancey & Company, Plaintiff in Error,*
By H. GENERES DUFOUR,
WM. C. DUFOUR,
AUGUSTUS BENNERS,
W. A. BLOUNT,
*His Attorneys.*

The foregoing petition is granted, and a writ of error allowed as prayed for upon plaintiff in error giving bond, according to law, in the sum of five hundred dollars.

DON A. PARDEE,
*Circuit Judge.*

Dec. 28th, 1912.

Service accepted.

HENRY P. DART,
*Att'y on Behalf of all Def'ts in Error.*

The foregoing has the following indorsements to-wit: In the United States Circuit Court of Appeals, Fifth Circuit. No. 2296. William S. Lovell, Trustee, vs. Isidore Newman & Son et al. Petition for Writ of Error. Filed 28th day of Feb. 1912. F. H. Mortimer, Clerk of the United States Circuit Court of Appeals.

*Assignment of Errors.*

United States Circuit Court of Appeals, Fifth Circuit.

No. 2296.

WILLIAM S. LOVELL, Trustee in Bankruptcy of Knight, Yancey & Company, Plaintiff in Error,
versus
ISIDORE NEWMAN & SON et als., GIANOLI BROTHERS et als., Defendants in Error.

Assignments of Errors.

Now comes William S. Lovell, Trustee in Bankruptcy of Knight, Yancey & Company, plaintiff in error, by his attorney and says, that in the record and proceedings aforesaid of the United States Circuit Court of Appeals for the Fifth Circuit, in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error, in this, to-wit:

First. Said Circuit Court of Appeals erred in rendering the judgment affirming the judgment of the Circuit Court of the United States for the Eastern District of Louisiana.

Second. Said Circuit Court of Appeals erred in not reversing the judgment of the Circuit Court of the United States for the Eastern District of Louisiana, and in not awarding a new trial to plaintiff in error.

Third. Said Circuit Court of Appeals erred in not sustaining the 12th assignment of error upon the record in said cause, which is as follows, to-wit:

"12. The Court erred in refusing to find the facts to be as set forth in the agreed statement of facts on which the cause was tried, pursuant to the request made by the plaintiffs to that end."

Fourth. Said Circuit Court of Appeals erred in not sustaining the 13th assignment of error upon the record in said cause, which is as follows, to-wit:

"13. The Court erred in refusing to make the following finding which it was requested in writing to make:

'1. When Knight, Yancey & Company delivered the lots of cotton in question to the carriers at Decatur and Selma, respectively, Knight, Yancey & Company did not intend that title to said cotton should then pass to the spinners, Knight, Yancey & Company delivered their cotton, as declared in the stipulation, to the Railroad Companies, and received from the Railroad Companies bills of lading to shippers' order, thus retaining the jus disponendi. There is no proof that Knight, Yancey & Company did intend that title should pass to the spinners, and, therefore, the Court finds as a fact that they did not so intend. The defendants failed to adduce proof to overcome the legal presumption.'"

Fifth. Said Circuit Court of Appeals erred in not sustaining the 14th assignment of error upon the record in said cause, which is as follows, to-wit:

"14. The Court erred in refusing to make the following finding which — was requested by the plaintiff in writing to make:

'2. The shipments called for by the various contracts were for January and February, 1910, shipment. No shipments in point of fact were made in January and February, 1910. All of the shipments, as appears from the statement of facts, were made in April, 1910, with the exception of one shipment made in March, 1910. There is no proof in the record that the spinners consented to the modification of the contract for March-April shipment instead of January-February shipment, and, therefore, the Court finds as a fact that there was no mutual understanding to the change or modification of the contract in the particular aforementioned, and that, therefore, there was no delivery under the contract.'"

Sixth. Said Circuit Court of Appeals erred in not sustaining the 15th assignment of error upon the record in said cause, which is as follows, to-wit:

"15. The Court erred in refusing to make the following finding which it was requested in writing to make:

'3. The contracts in question were all c. i. f. contracts, that is costs, insurance and freight to be paid by the shippers. No insurance was taken out by Knight, Yancey & Company in favor of the spinners, or anybody else, when they delivered the actual cotton to the carriers; and therefore, when the cotton was delivered to the carrier, and at all time thereafter, same was not insured in favor of the spinners as provided for in their respective contracts. Said cotton was at the risk of Knight, Yancey & Company, who held the bills of lading therefor to shippers' order, and a portion of said cotton was in fact thereafter hypothecated by Knight, Yancey & Company for their debt.'"

Seventh. Said Circuit Court of Appeals erred in not sustaining the 16th assignment of error upon the record in said cause, which is as follows, to-wit:

"16. The Court erred in overruling plaintiff's motion to find the facts as stipulated by the parties and as set forth in their stipulation filed in the cause, and, upon such finding, to render judgment in favor of the plaintiff and against the defendants, Isidore Newman & Son and E. A. Neugass in the sum of $91,345.25."

Eighth. Said Circuit Court of Appeals erred in not sustaining the 17th assignment of error upon the record in said cause, which is as follows, to-wit:

"17. The Court erred in making the following finding of fact:

'6. That by marking and shipping the said cotton as above set out, Knight, Yancey & Company intended to appropriate and did appropriate it to the fulfillment of the said eight contracts of sale, and that by delivering it to the carrier they perfected delivery to the buyers under the terms of the said contracts.'

There is no evidence in the cause to support said finding of the Court."

Ninth. Said Circuit Court of Appeals erred in not sustaining the 18th assignment of error upon the record in said cause, which is as follows, to-wit:

"18. The Court erred in making the following finding of fact.

'7. That Knight, Yancey & Company retained the genuine bills of lading for the said cotton in their own possession, and that it was their intention to suppress them and to allow the buyers to claim the cotton on the forged bills of lading attached to the drafts above mentioned.'

There was no evidence in the cause which would support said finding."

Tenth. Said Circuit Court of Appeals erred in not sustaining the 19th assignment of error upon the record in said cause, which is as follows, to-wit:

"19. The Court erred in making the following finding of fact:

'8. That all right, title and interest of Knight, Yancey & Company to the said 1400 bales of cotton had passed out of them and that they had no lien or claim of any kind upon it before their adjudication in bankruptcy.'

Said finding was in conflict with the agreed statement of facts on which the cause was tried."

Eleventh. Said Circuit Court of Appeals erred in not sustaining the 20th assignment of error upon the record in said cause, which is as follows, to-wit:

"20. The Court erred in finding:

'9. That the Trustee has no right, title or interest in or *two*, or claim upon, the said cotton of any nature whatsoever.'

Said finding is *a* conflict with the uncontradicted evidence in the cause."

Twelfth. Said Circuit Court of Appeals erred in not sustaining the 21st assignment of error upon the record in said cause, which is as follows, to-wit:

"21. The Court erred in making the following finding:

'10. That Knight, Yancey & Company and their Trustee, plain-

tiff herein, are estopped to assert any right, title or interest in or to the said 1400 bales of cotton.'

There is no evidence in the record which will support said finding."

Thirteenth. Said Circuit Court of Appeals erred in not sustaining the 22nd assignment of error upon the record in said cause, which is as follows, to-wit:

"22. The Court erred in overruling plaintiff's motion to set aside the findings of fact filed by it in the cause and to find that the Trustee had the right, title and interest in the cotton the subject matter of the suit, at the time that same was seized pursuant to the order of the District Court."

Fourteenth. Said Circuit Court of Appeals erred in not sustaining the 23rd assignment of error upon the record in said cause, which is as follows, to-wit:

"23. The Court erred in granting defendants' motion to enter judgment for the defendants for their costs."

Fifteenth. Said Circuit Court of Appeals erred in holding that the cotton in controversy became, prior to the adjudication in bankruptcy, the property of the spinners (interveners herein), and that hence, it could not have been lawfully transferred by the bankrupts, nor was it subject to levy and sale under judicial process against them.

Sixteenth. Said Circuit Court of Appeals erred in holding that the bankrupts were estopped from claiming the title to the cotton in controversy, and that their trustee was likewise estopped, and that he, the said trustee, stood in the shoes of and occupied no better position than the bankrupts themselves.

Seventeenth. Said Circuit Court of Appeals erred in holding that the spinners (interveners herein), although ignorant of all of the circumstances, were and are presumed to have waived the performance of the conditions precedent as to (*a*) time of delivery (*b*) the effecting of insurance for their benefit (*c*) the delivery to them of Liverpool Conference Bills of Lading to evidence the shipment because, in view of the subsequent bankruptcy of Knight, Yancey & Company, it resulted and turned out that such waiver would have been and was of advantage to the spinners (interveners herein).

Eighteenth. Said Circuit Court of Appeals erred in holding that Knight, Yancey & Company intended, by delivering the actual cotton to the carriers, to appropriate same to their contracts with the spinners (interveners herein); and, furthermore, the said Circuit Court of Appeals erred in holding, even if Knight, Yancey & Company had such intention, that same operated to transfer title from Knight, Yancey & Company to the spinners (interveners herein) as against the creditors of Knight, Yancey & Company and their trustee in bankruptcy.

Nineteenth. Said Circuit Court of Appeals erred in holding that the action of the spinners (interveners herein) after the adjudication in bankruptcy, and after said adjudication was known to them, could have any effect in changing the status of the parties or in vest-

ing title which had not vested previous to the adjudication in bankruptcy.

Wherefore, said William S. Lovell, Trustee in Bankruptcy of Knight, Yancey & Company, plaintiff in error, prays that for the errors aforesaid, and other errors appearing in the record of said Circuit Court of Appeals in the above entitled cause, to the prejudice of plaintiff in error, the said judgment of the United States Circuit Court of Appeals for the Fifth Circuit be reversed and annulled, and that said cause be remanded to the District Court of the United States for the Eastern District of Louisiana, with instructions to grant a new trial in said case, or for such further proceedings in said case as may be determined upon to the end that justice may be done in the premises.

WILLIAM S. LOVELL,
*Trustee in Bankruptcy of Knight, Yancey & Company, Plaintiff in Error,*
By H. GENERES DUFOUR,
WM. C. DUFOUR,
AUGUSTUS BENNERS,
W. A. BLOUNT,
*His Attorneys.*

The foregoing has the following indorsements to-wit: In the United States Circuit Court of Appeals, Fifth Circuit. No. 2296. William S. Lovell, Trustee, vs. Isidore Newman & Son et al. Assignments of Error. Filed 28th day of February, 1912. F. H. Mortimer, Clerk of the United States Circuit Court of Appeals.

*Bond.*

WILLIAM S. LOVELL, Trustee in Bankruptcy of Knight, Yancey & Company, Plaintiff in Error,
versus
ISIDORE NEWMAN & SON et als., GIANOLI BROTHERS et als., Defendants in Error.

Know all men by these presents that we, William S. Lovell, Trustee in Bankruptcy of Knight, Yancey & Company as principal, and National Surety Company, as surety, are held and firmly bound unto Isidore Newman & Son, Mrs. Isidore Newman, Jacob K. Newman, Edward A. Neugass, the Cotonificio Cantoni, Cotonificio Furter, the Manifattura Tosi, Gianoli Brothers, Guido Gianoli, Rinaldo Gianoli, Giovanni Gianoli, Carina Dupre Gianoli, A. Bernocchi Brothers, Antonio Bernocchi, Allesandro Bernocchi, Michael Bernocchi and Andrea Bernocchi, in the sum of Five Hundred & no/100—Dollars, lawful money of the United States, for the payment whereof we bind ourselves executors and assigns forever.

Sealed with our seal-, and dated this 28th day of February, 1912.

Whereas, lately in the United States Circuit Court of Appeals for the Fifth Circuit, in a suit pending in said court between William S. Lovell, Trustee in Bankruptcy of Knight, Yancey & Company,

plaintiff in error, and Isidore Newman & Son, Mrs. Isidore Newman, Jacob K. Newman, Edward A. Neugass, the Cotonificio Cantoni, the Cotonificio Furter, the Manifattura Tosi, Gianoli Brothers, Gyido Gianola, Rinaldo Gianoli, Giovanni Gianoli, Carina Dupre Gianoli, A. Bernocchi Brothers, Antonio Bernocchi, Allesandro Bernocchi, Michael Bernocchi and Andres Bernocchi, defendants in error, a judgment was rendered against the said plaintiff in error, William S. Lovell, Trustee in Bankruptcy of Knight, Yancey & Company, and said plaintiff in error, William S. Lovell, Trustee in Bankruptcy of Knight, Yancey & Company, having obtained a writ of error and filed a copy thereof in the Clerk's office of said Court, to reverse said judgment in the aforesaid suit, and citations directed to said defendants in error, Isidore Newman & Son, Mrs. Isidore Newman, Jacob K. Newman, Edward A. Neugass, the Cotonificio Cantoni, the Cotonificio Furter, the Manifattura Tosi, Gianoli Brothers, Guido Gianoli, Rinaldo Gianoli, Giovanni Gianoli, Carina Dupre Gianoli, A. Bernocchi Brothers, Antonio Bernocchi, Allesandro Bernocchi, Michael Bernocchi and Andrea Bernocchi, citing and admonishing them to be and appear at a session of the Supreme Court of the United States, to be holden at the City of Washington, on the 29th day of March next.

Now, therefore, the condition of the above obligation is such that if the said plaintiff in error, William S. Lovell, Trustee in Bankruptcy of Knight, Yancey & Company, shall prosecute said writ of error to effect and answer all damages and costs, if he fails to make his plea good, then the above obligation shall be void, else remain in full force and virtue.

W. S. LOVELL,
*Trustee in B'kr'ptcy of Knight, Yancey & Co.,*
By PERCY, BENNERS & BURR, &
H. GENERES DUFOUR,
*His Attorneys.*
NATIONAL SURETY COMPANY,
By WM. A. TOURTAREL, [SEAL.]
*Res. Vice-President.*
J. V. KEATING,
*Res. Ass't Secretary.*

Accepted
DON A. PARDEE.

The foregoing has the following indorsements to-wit: In the United States Circuit Court of Appeals, Fifth Circuit. No. 2296. William S. Lovell, Trustee, vs. Isidore Newman & Son, et al. Bond. Filed 28th day of February, 1912. F. H. Mortimer, Clerk of the United States Circuit Court of Appeals.

UNITED STATES OF AMERICA:

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between William S. Lovell, Trustee in Bankruptcy of Knight, Yancey & Company, plaintiff in error, and Isidore Newman & Son, Mrs. Isidore Newman, Jacob K. Newman, Edward A. Neugass, the Cotonificio Cantoni, Cotonificio Furter, the Manifattura Tosi, Gianoli Brothers, Guido Gianoli, Rinaldo Gianoli, Giovanni Gianoli, Carina Dupre Gianoli, A. Bernocchi Brothers, Antonio Bernocchi, Allesandro Bernocchi, Michael Bernocchi and Andrea Bernocchi, defendants in error, a manifest error hath happened, to the great damage of said William S. Lovell, Trustee in Bankruptcy of Knight, Yancey & Company, plaintiff in error, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Cheif Justice of the said Supreme Court, the 28th day of February, in the year of our Lord one thousand nine hundred and twelve.

FRANK H. MORTIMER,
*Clerk of the United States Circuit Court of Appeals.*

Allowed
DON A. PARDEE,
*Circuit Judge.*

It is hereby certified that a copy of this writ is this day lodged in the Clerk's office for the use of the defendant in error, this 28th day of February 1912.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER, *Clerk.*

[Endorsed:] In the United States Circuit Court of Appeals, Fifth Circuit. No. 2296. William S. Lovell, Trustee, vs. Isidore Newman & Son et al. Writ of Error. Filed 28th day of February 1912. F. H. Mortimer, Clerk of the United States Circuit Court of Appeals.

UNITED STATES OF AMERICA:

The President of the United States to Isidore Newman & Son, Mrs. Isidore Newman, Jacob K. Newman, Edward A. Neugass, the Cotonificio Cantoni, Cotonificio Furter, the Manifattura Tosi, Gianoli Brothers, Guido Gianoli, Rinaldo Gianoli, Giovanni Gianoli, Carina Dupre Gianoli, A. Bernocchi Brothers, Antonio Bernocchi, Allesandro Bernocchi, Michael Bernocchi, Andrea Bernocchi, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States — holden at the City of Washington, District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of Appeal- of the United States for the Fifth Circuit, and wherein William S. Lovell, Trustee in Bankruptcy of Knight, Yancey & Company, is plaintiff in error, and you, Isidore Newman & Son, Mrs. Isidore Newman, Jacob K. Newman, Edward A. Neugass, the Cotonificio Cantoni, Cotonificio Furter, the Manifattura Tosi, Gianoli Brothers, Guido Gianoli, Rinaldo Gianoli, Giovanni Gianoli, Carina Dupre Gianoli, A. Bernocchi Brothers, Antonio Bernocchi, Allesandro Bernocchi, Michael Bernocchi and Andrea Bernocchi, are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, this 28th day of February, in the year of our Lord one thousand nine hundred and twelve.

DON A. PARDEE,
*Circuit Judge.*

I hereby accept due and personal service of this citation on behalf of the defendants in error therein mentioned, and each of them.

HENRY P. DART,
*Att'y on Behalf of All Def'ts in Error.*

N. O., Feb'y 28, 1912.

[Endorsed:] In the United States Circuit Court of Appeals, Fifth Circuit. No. 2296. William S. Lovell, Trustee vs. Isidore Newman & Son et al. Citation. Filed 28th day of February 1912. F. H. Mortimer, Clerk of the United States Circuit Court of Appeals.

United States Circuit Court of Appeals for the Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 199 to 239 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the U. S. Circuit Court of

Appeals for the Fifth Circuit, in a certain cause in said court, numbered 2296, wherein William S. Lovell, Trustee of Knight, Yancey & Company is plaintiff in error, and Isidore Newman & Son et al. are defendants in error, as full, true and complete as the originals of the same now remain on file and of record in my office, except that the original citation and writ of error are included instead of copies.

I further certify that the pages of the printed record numbered from 1 to 198 are identical with the printed records upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 12th day of March A. D. 1912.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK HASTINGS MORTIMER,
*Clerk of the United States Circuit Court of Appeals.*

*Stipulation as to Original Documents.*

United States Circuit Court of Appeals, Fifth Circuit.

No. 2296.

WILLIAM S. LOVELL, Trustee in Bankruptcy of Knight, Yancey & Company, Plaintiff in Error,
versus
ISIDORE NEWMAN & SON et als., GIANOLI BROTHERS et als., Defendants in Error.

It is hereby stipulated by and among counsel for the plaintiff in error and defendants in error respectively, that the original bills of lading, invoices and broker's memoranda now on file in this Court be not included in the record on writ of error from the Supreme Court of the United States to this Court:

That said record consist of the printed transcript of the record of the Court below, and the proceedings had in this Court.

DUFOUR & DUFOUR,
*Att'ys for Pl'ff in Error.*
DART, KERNAN & DART,
*Att'ys for Def't in Error.*

N. O., March 15, 1912.

The foregoing has the following indorsements to-wit: No. 2296. United States Circuit Court of Appeals, Fifth Circuit. William S. Lovell, Trustee in Bankruptcy of Knight, Yancey & Company, Plaintiff in Error, versus Isidore Newman & Son, et als., Gianoli Brothers, et als., Defendants in Error. Stipulation. Dufour & Dufour, Att'ys for Plaintiff in Error. U. S. Circuit Court of Appeals. Filed Mar. 16, 1912. Frank H. Mortimer, Clerk.

United States Circuit Court of Appeals for the Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing 1 page numbered from —to —, inclusive, contain- a true copy of the stipulation as to original documents in the case of William S. Lovell, Trustee, versus Isidore Newman & Son et al. No. 2296, as the same remains upon the files and records of said United States Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 16th day of March A. D. 1912.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
*Clerk of the United States Circuit Court of Appeals for the Fifth Circuit,*
Per WILLIE A. TEITELBAUM, *Deputy.*

[Endorsed:] In the United States Circuit Court of Appeals, Fifth Circuit. No. 2296. William S. Lovell, Trustee, vs. Isidore Newman & Son et al. (Copy of stipulation as to original documents.)

Endorsed on cover: File No. 23,119. U. S. Circuit Court Appeals, 5th Circuit. Term No. 1043. William S. Lovell, trustee in bankruptcy of Knight, Yancey & Company, plaintiff in error, vs. Isidore Newman & Son et al. Filed March 25th, 1912. File No. 23,119.

Office Supreme Court, U. S.
FILED.
DEC 14 1912
JAMES H. McKENNEY,
CLERK.

# In the Supreme Court of the United States.

October Term, 1912. No. 593.

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WILLIAM S. LOVELL, Trustee in Bankruptcy of KNIGHT, YANCEY & COMPANY, Bankrupts.
Plaintiff in Error.

vs.

ISIDORE NEWMAN & SON, Et. Als.,
Defendants in Error.

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IN ERROR TO THE CIRCUIT COURT OF APPEALS, FIFTH ~~DISTRICT~~ Circuit

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## BRIEF FOR PLAINTIFF IN ERROR ON PETITION FOR WRIT OF CERTIORARI.

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H. GENERES DUFOUR,
W. A. BLOUNT,
WALKER PERCY,
Attorneys for Plaintiff in Error.

Dispatch Printing Co., Birmingham, Ala.

# In the Supreme Court of the United States.

October Term, 1912. No. 593.

---

WILLIAM S. LOVELL, Trustee in Bankruptcy of KNIGHT, YANCEY & COMPANY, Bankrupts.

Plaintiff in Error.

vs.

ISIDORE NEWMAN & SON, Et. Als.,

Defendants in Error.

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IN ERROR TO THE CIRCUIT COURT OF APPEALS, FIFTH DISTRICT.

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## BRIEF FOR PLAINTIFF IN ERROR ON PETITION FOR WRIT OF CERTIORARI.

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H. GENERES DUFOUR,
W. A. BLOUNT,
WALKER PERCY,

Attorneys for Plaintiff in Error.

## INDEX.


Statement of the Case ..... 3
Synopsis of the Brief ..... 8
Errors Assigned ..... 9
The Right to the Writ of Error ..... 16
Practice where Review as a Matter of Right and Certiorari are both Sought ..... 25
Summary of the Argument on the Merits ..... 25
Argument on the Merits ..... 45
The *Jus Disponendi* is Title ..... 50
The Cotton was not the Subject of any Contract between the Spinners and the Bankrupts ..... 56
General Rules as to Appropriation ..... 56
Lack of Insurance ..... 61
Actual Acceptance and Waiver after Bankruptcy ..... 71
Estoppel ..... 73
The Trustee's Status ..... 81
The Questions in the Case are Questions of Law 88

## Table of Cases Cited.

Acme Harvester Co. vs. Beekman Lumber Co., 222 U. S., 300 ..... 32-71
Ala. G. S. R. R. Co. vs. Mt. Vernon Co., 84 Ala., 173 ..... 35
Alsberg vs. Latta, 30 Iowa, 442 ..... 28, 59
Ashmore vs. Cox, L. R. (1899) 1 Q. B., 436 ..... 28
Atchinson, Etc. R. R. vs. Schriver, 84 Pac., 119 ..... 29, 36
Atlantic Coast Line vs. Dahlberg Brokerage Co., 54 S. R., 169 ..... 29
Atherton vs. Greene, 179 F. R., 806 ..... 43

Baldwin vs. Peet, 75 Am. Dec. (Tex.), 806 ..... 41
Bell vs. Farmers Bank, 11 Bush, 34 ..... 40, 66
Belding Hall Mfg. Co. vs. Mercer-Ferdon Lumber Co., 175 F. R., 388 ..... 30, 32, 72
Bennecke vs. Conn. Mutual Life Ins. Co., 105 U. S., 305 ..... 32
Benedict vs. Renfro, 75 Ala., 121 ..... 34, 82
Birmingham Dry Goods Co. vs. Roden, 110 Ala., 511 ..... 34
Block vs. Shaw, 95 S. W., 806 ..... 44, 76
Bowden Bros. vs. Little, 4 Comm., 1364 ..... 28
Booneville Nat. Bk. vs. Burke, 107 F. R., 891 ..... 22
Board of Supervisors vs. Kennicott, 103 U. S., 486 ..... 90
Bryans vs. Nix, 4 M. & W., 794 ..... 44, 75
Brittania vs. Cleugh, 153 U. S., 130 ..... 90
Burgoyne vs. McKillip, 182 F. R., 452 ..... 43

Campbell vs. Mersey Docks, 14 C. B. (N. S.), 412 ..... 57
Christian, Etc. Co. vs. Michaels, 121 Ala., 84 ..... 34
Clark vs. Rogers, 183 F. R., 518 ..... 43
Clark vs. Hutchins, 14 Eastman (Exch.), 475 ..... 29
Clingham vs. Miller, 160 F. R., 326 ..... 43
Connelly in re, 100 Fed. Rep., 620 ..... 21
Constantine vs. Twelves, 29 Ala., 607 ..... 34
Cravens vs. Rossiter, 116 Mo., 338 ..... 39, 42, 66, 67

Detroit Trust Co. vs. Pontiac Sav. Bk., 196 F. R., 29 ..... 22
Doe vs. Knight, 5 B. & C., 692 ..... 66
Dows vs. Nat. Exc. Bank, 91 U. S., 618 ..... 35, 52, 54

Ellershaw vs. Magniac, 6 Exc., 570 ..... 36, 53
Elmes vs. Southerland, 7 Ala., 262 ..... 39, 66

Farrell vs. O'Brien, 199 U. S., 101 ..... 25
Files vs. Davis, 118 F. R., 465 ..... 25
Filley vs. Pope, 115 U. S., 213 ..... 28
Fourth St. Nat. Bk. vs. Millbourne Mills Trustee, 172 F. R., 177 ..... 36, 87
Forbes vs. Boston & L. R. R., 133 Mass., 154 ..... 29
Frances, The, 8 Cranch, 359; Ibid, 8 Cranch, 354 ..... 31, 63
Furman vs. Union Pac. R. R., 106 N. Y., 579 ..... 29

Gabarron vs. Kreeft, L. R. 10 Exc., 274 ..... 35
Giffard vs. Corrigan, 105 N. Y., 223 ..... 66
Great Sou. Fire Proof Hotel Co. vs. Jones, 177 U. S., 449 ..... 21
Grove vs. Brien, 8 How., 429 ..... 41, 70

Haffenberg vs. Chicago Title, Etc. Co., 192 F. R., 874 ..... 22
Hall vs. Ala. Terminal, Etc. R. R. Co., 143 Ala., 474 ..... 34, 85
Halsey vs. Fairbanks, Federal Case No. 5964 ..... 39-67
Heningson vs. U. S. Fidelity Co., 208 U. S., 404 ..... 17
Henderson vs. McFadden, 112 F. R., 389 ..... 28
Hoover vs. Mahr, 51 Minn., 269; 53 N. W. 646, 28, 58
Hulick vs. Scovill, 4 Gillman (9 Ill.), 159 ..... 66
Hull Coal Co. vs. Empire Coal Co., 113 F. R., 256 28

Idaho, The, 93 U. S., 575 ..... 45, 79

Jackson vs. Hale, 14 How., 525 ..... 44
Jones vs. Brewer, 79 Ala., 545 ..... 35
Jones vs. Schneider, 22 Minn., 279 ..... 30

Kansas City Stone, Etc. Co., Re Fed. Case No. 7610.....39, 66, 68
King vs. Kenan, 38 Ala., 63.....34
Knapp vs. Milwaukee Trust Co., 216 U. S., 557..33, 86

Leslie vs. Brown, 90 F. R., 171.....23
Low vs. Pew, 108 Mass., 349.....32, 73

McCormick vs. Joseph, 77 Ala., 236.....35
McDonald vs. Pearre Bros., 62 S. E., 830.....29, 61
McDermott vs. Eborn, 90 Ala., 258.....34, 84

Mansfield, Etc. Ry. Co. vs. Swan, 111 U. S., 379 21
Merchants Insurance Co. vs. Allen., 122 U. S., 71.. 90
Metcalf vs. City of Watertown, 128 U. S., 586..... 21
Montana Min. Co. vs. St. Louis Min. Co., 204 U. S., 204.....25

Nemeyer Lumber Co. vs. Burlington R. R., 54 Neb., 321.....35
New York Tartar Co. vs. French, 154 Pa. St., 273.. 29
Nicoll vs. Mumford, 4 Johns. Chan., 522.....41, 70
Norrington vs. Wright, 115 U. S., 188.....28-63
Northern Pac. Ry. vs. Soderberg, 188 U. S., 526.... 17
Northern Pa. R. R. vs. Com. Nat. Bk., 123 U. S., 727.....29

O'Neill vs. Birmingham Brewing Co., 101 Ala., 383.....34

Parmelee vs. Simpson, 5 Wal., 81.....39, 40, 66, 68
Porter vs. Boyd, 171 F. R., 305.....32
Porter vs. Edwards, 29 Hun., 509.....28

Reynolds vs. Crook, 31 Ala., 634.....34
Roden vs. Norton, 128 Ala., 129.....35
Rogers, In re.....87

Saltonstall vs. Russell, 158 U. S., 628.....92
Sandlin vs. Robbins, 62 Ala., 477.....35

Schoolfield vs. Hirsh, 14 S. R., 528 ..... 41
Security Warehousing Co. vs. Hand, 206 U. S., 415 ..... 33, 37, 86
Sharp vs. Phila. Warehouse Co., Fed. Case 12709a 43
Smith, Tr., vs. Township Au Gres, 80 C. C. A., 145 43
Sneathen vs. Grubbs, 88 Pa., 147 ..... 28, 57
Soper vs. Creighton, 93 Man., 564 ..... 28
Spencer vs. Duplan Silk Co., 191 U. S., 526 ..... 18
Stanford vs. McGill, 72 N. W., 938 ..... 44, 78
St. Jose Indianao, 1 Wheaton, 208 ..... 36, 51

Tatlow vs. Turner, 28 Tex., 759 ..... 40, 66
Thames vs. Seaman, 14 Wal., 98 ..... 29, 48
Thompson vs. Drake, 107 Ill., 87 ..... 40
Thompson vs. Sioux Falls Nat. Bk., 150 U. S., 231 44
Tompkins vs. Wheeler, 16 Pet., 118 ..... 42
Truitt vs. Cook, 129 Ala., 377 ..... 34
Tullock vs. Mulvane, 184 U. S., 497 ..... 23
Turner vs. Trustee Liverpool Docks, 6 Exc., 543 .... 36

United States vs. Eliason, 16 Pet., 91 ..... 91
United States vs. Clark, 96 U. S., 37 ..... 91
Upham vs. N. Y. Loan & Tr. Co., 76 N. Y., 1 ..... 43

Wait vs. Baker, 2 Exc., 1 ..... 35
White Smith Music Co. vs. Appollo Co., 209 U. S., 1 ..... 25
White, In re. 177 F. R., 194 ..... 22
Wright vs. Bragg, 96 F. R., 729 ..... 91
Wright vs. Colton Wire Cloth Co., Waren, 117 Mass., 283 ..... 29

York Mfg. Co. vs. Cassell, 201 U. S., 344 ..... 36, 37
Young vs. East Ala., R. R. Co., 80 Ala., 100 ..... 29
Young vs. Guilbeau, 3 Wal., 636 ..... 40, 66

# In the Supreme Court of the United States.

**October Term, 1912. No. 583.**

---

**WILLIAM S. LOVELL, Trustee in Bankruptcy of KNIGHT, YANCEY & COMPANY, Bankrupts,**

**Plaintiff in Error,**

**vs.**

**ISIDORE NEWMAN & SON, Et Als.,**

**Defendants in Error.**

---

**IN ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.**

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## Statement of the Case

This brief accompanies a petition for a writ of certiorari presented by plaintiff in error. Defendants in error have indicated their purpose to move to dismiss the writ of error to this Court taken by plaintiff in error, and the year within which a petition for a writ of certiorari being about to expire, and the case being one which it is believed will address itself to the discretion of the Court as being proper for its review, regardless of whether it may be reviewed as a matter of right, the petition for a writ of certiorari is now presented.

The suit was an action at law brought by the Trustee in Bankruptcy of Knight, Yancey & Company in the Circuit Court of the United States for the Eastern District of Louisiana to recover the

value of 1,311 bales of cotton which it was claimed were assets of the bankrupt estate. The removal of the cotton from the Port of Chalmette had been enjoined by the District Court of the United States on the petition of the Receivers of that estate, and in order to secure its removal, a bond permitted by the Court granting the injunction had been given by the Master of a steamship on which cotton was being loaded, with the defendants in error as sureties, conditioned as follows:

"NOW, THEREFORE, the condition of this obligation is such that if said Th. Ruhne (the Master) and Isidore Newman and Son (sureties), New Orleans, La., above mentioned shall well and truly pay to said obligees (the Receivers and Trustee in Bankruptcy of Knight, Yancey & Company), the sum of Ninety-eight Thousand Five Hundred Dollars ($98,500.00), or such part thereof as the Court may direct, *if, in a suit or action at law or in equity that may or shall hereafter be brought on this bond by said Receivers, or by said Trustee or Trustees, or by said estate in bankruptcy against the obligors herein or either of them, in the Circuit or District Courts of the United States for the Eastern District of Louisiana, it shall be adjudged that said Receivers, or said Trustee or Trustees of said Knight, Yancey & Company, or the bankrupt estate of said Knight, Yancey & Company have the right, title or interest in or to said cotton, or any part thereof,* then and in such case this obligation shall be null, void, and of no effect; otherwise the same shall remain in full force and effect." Record, page 150.

This suit was brought by the Plaintiff in Error, the Trustee in Bankruptcy of Knight, Yancey

& Company, on this bond. The question in the case was, therefore, whether the Trustee had "the right, title or interest in or to said cotton or any part thereof." The suit was tried on agreed facts. The stipulation setting forth the facts, except the value of the cotton, is on pages 46-52, Record. The value of the cotton was $92,833.22 (page 151, Record).

The Trustee showed title in himself by the facts set forth in the 8th paragraph of the stipulation, page 48, Record. It there appears that the bankrupts on various dates between March 16th and April 11th, 1910, shipped to their order 1,400 bales of *their* cotton, 1,311 bales of which were the cotton involved.

The cotton was all shipped by Knight, Yancey & Company over the Southern Railway and connecting carriers, to Genoa, under 13 bills of lading, all of which were of the same form, one of them being set out at length on pages 56-57, Record. The essential portions of the remaining twelve are recited on pages 67-70, Record.

That the shipment was to be carried and delivered to shippers order appears from the portion of the bill of lading set out at the bottom of page 56, Record, where it appears that the cotton was received from Knight, Yancey & Company, "Consigned and destined as indicated below:

"Consignee and Destination } Shippers Order, Genoa, Italy, Party to be notified, Gino Gavirati Genoa, Italy."

Similar provisions are recited to have been embraced in the remaining bills of lading.

The Trustee contends that a perfect title to

the cotton is shown in him by the showing that it was the bankrupts' cotton at the time of shipment, and by the facts as to the adjudication of Knight, Yancey & Company to be bankrupt, and his appointment as their Trustee. Paragraph 15, Stipulation, page 51, Record.

The Italian spinners named in the caption of the record contend that there was no title in the Trustee because the title was in them, and to show such title rely on the following facts: On sundry dates in December, 1909, and January, 1910, they severally agreed to buy from Knight, Yancey & Company various lots of cotton aggregating 3,400 bales, which were to be paid for through drafts drawn on the purchasers with the bills of lading, evidencing the cotton, attached. Contracts, pages 79-86, Record. That between January 21st and February 8th, 1910, Knight, Yancey & Company drew drafts on the several spinners or their bankers for large sums to which were attached forged bills of lading calling for fictitious cotton, to which were also attached insurance certificates on such fictitious cotton. The drafts appear on pages 104-113, Record. The insurance certificates were all of the same form. One appears on pages 114-115, Record, and the substance of the remainder on page 116. The spinners accepted these drafts on various dates in February, 1910, and subsequently paid them. They believed the fictitious bills of lading to be genuine. Invoices for the fictitious cotton were also sent by the bankrupts.

So far as the record shows, the Italian spinners never heard of the cotton, the value of which is in suit, until after Knight, Yancey & Company were

adjudged bankrupts and until after the removal of the cotton from Chalmette was enjoined.

The marks used in the fictitious bills of lading, in the drafts, insurance certificates and invoices, were the same as those with which the cotton was marked, and were the same as those contained in the bills of lading under which the cotton in controversy was shipped.

Of the bills of lading issued for the cotton by the Southern Railway Company, those for 500 bales were hypothecated by the bankrupts with a bank at Selma, Alabama, to secure advances made them by the bank; they remained there until four days before Knight, Yancey & Company were adjudged bankrupts, when the advances were repaid and the bills of lading released. They were then retained by the bankrupts until they were delivered by the bankrupts to Plaintiff in Error, their Trustee. The bills of lading for the remainder of the cotton were retained by the bankrupts from the time of their issuance by the Southern Railway Company until they were delivered by the bankrupts to their Trustee (Record, pages 48-49).

The Circuit Court held on this state of facts that the title to all the cotton had passed into the Italian spinners prior to the bankruptcy of Knight, Yancey & Company, and that consequently no title to it passed from them on their adjudication to their Trustee, and gave judgment for the defendants, who are Defendants in Error. Lovell vs. Newman, 188 Fed. Rep., 534. The Circuit Court of Appeals affirmed the case. Lovell vs. Newman, 192 Fed. Rep., 753.

Plaintiff in Error then sued out a writ of error

to the Supreme Court, which was allowed by the Judges of the Circuit Court of Appeals, Fifth Circuit.

## Synopsis of Brief.

The right to the writ of error is discussed in this brief at pages 16 et seq.

The reasons urged on this Court for the issue of its writ of certiorari are set forth in the petition for this writ at pages 12 to 17, thereof.

Cases dealing with the practice of this Court where reveiw by it as a matter of right is questioned and the writ of certiorari is prayed, and deemed proper, are discussed at pages 25 ot this brief.

A summary of the argument of the case on its merits with the authorities relied on is at pages 25 et seq. of this brief.

An argument with quotations from the cases relied on is at pages 45 et seq. of this brief.

Both the Circuit Court and the Circuit Court of Appeals dealt with the case solely on its merits. There was no conflicting evidence in it. The case presents pure questions of law. It was tried in the Circuit Court on agreed facts without a jury; the stipulation setting forth the agreed facts provided that either party might object to any fact on the ground of materiality and relevancy. By such objections and requests for findings and the rulings thereon and the exceptions thereto as well as to the judgment, the questions of law were preserved, the rulings and exceptions being preserved in a bill of exceptions found at pages 44 to 178 ot the record.

The cases dealing with the practice on review where cases are tried without a jury and on agreed facts are discussed in this brief at page 88.

The errors assigned in this Court, which are argued and insisted on, are as follows:

**Errors Assigned.**

First.—Said Circuit Court of Appeals erred in rendering the judgment affirming the judgment of the Circuit Court of the United States for the Eastern District of Louisiana.

Second.—Said Circuit Court of Appeals erred in not reversing the judgment of the Circuit Court of the United States for the Eastern District of Louisiana, and in not awarding a new trial to plaintiff in error.

Third.—Said Circuit Court of Appeals erred in not sustaining the 12th assignment of error upon the record in said cause, which is as follows, to-wit:

> "12. The Court erred in refusing to find the facts to be as set forth in the agreed statement of facts on which the cause was tried pursuant to the request made by the plaintiffs to that end."

Fourth.—Said Circuit Court of Appeals erred in not sustaining the 13th assignment of error upon the record in said cause, which is as follows, to-wit:

> "13. The Court erred in refusing to make the following finding which it was requested in writing to make:

'1. When Knight, Yancey & Company delivered the lots of cotton in question to the carriers at Decatur and Selma respectively, Knight, Yancey & Company did not intend that title to said cotton should then pass to the spinners. Knight, Yancey & Company delivered their cotton, as declared in the stipulation, to the Railroad Companies, and received from the Railroad Companies bills of lading to shippers' order, thus retaining the jus disponendi. There is no proof that Knight, Yancey & Company did intend that title should pass to the spinners, and, therefore, the Court finds as a fact that they did not so intend. The defendants failed to adduce proof to overcome the legal presumption.'"

Fifth.—Said Circuit Court of Appeals erred in not sustaining the 14th assignment of error upon the retord in said cause, which is as follows, to-wit:

"14. The Court erred in refusing to make the following finding which was requested by the plaintiff in writing to make:

'2. The shipments called for by the various contracts were for January and February, 1910, shipment. No shipments in point of fact were made in January and February, 1910. All of the shipments as appears from the statement of facts, were made in April, 1910, with the exception of one shipment made in March, 1910. There is no proof in the record that the spinners consented to the modification of the contract for March-April shipment instead of January-February shipment, and, therefore, the Court finds as a fact that there was no mutual understanding to the change or modification of the contract in the particular aforementioned,

and that, therefore, there was no delivery under the contract.' "

Sixth.—Said Circuit Court of Appeals erred in not sustaining the 15th assignment of error upon the record in said cause, which is as follows, to-wit:

"15. The Court erred in refusing to make the following finding which it was requested in writing to make:

'3. The contracts in question were all c. i. f. contracts, that is cost, insurance and and freight to be paid by the shippers. No insurance was taken out by Knight, Yancey & Company in favor of the spinners, or anybody else, when they delivered the actaul cotton to the carriers; and therefore, when the cotton was delivered to the carrier, and at all times thereafter, same was not insured in favor of the spinners as provided for in their respective contracts. Said cotton was at the risk of Knight, Yancey & Company, who held the bills of lading therefore to shippers' order and a portion of said cotton was in fact thereafter hypothecated by Knight, Yancey & Company for their debt.' "

Seventh.—Said Circuit Court of Appeals erred in not sustaining the 16th assignment of error upon the record in said cause, which is as follows, to-wit:

"16. The Court erred in overruling plaintiff's motion to find the facts as stipulated by the parties and as set forth in their stipulation filed in the cause, and, upon such finding, to render judgment in favor of the plaintiff and against the defendants, Isidore Newman & Son, and E. A. Neugass in the sum of $91,345.25.

Eighth.—Said Circuit Court of Appeals erred in not sustaining the 17th assignment of error upon the record in said cause, which is as follows, to-wit:

"17. The Court erred in making the following finding of fact:

'6. That by marking and shipping the said cotton as above set out, Knight, Yancey & Company intended to appropriate and did appropriate it to the fulfillment of the said eight contracts of sale, and that by delivering it to the carrier they perfected delivery to the buyers under the terms of the said contracts.'"

There was no evidence in the cause to support said finding of the Court."

Ninth.—Said Circuit Court of Appeals erred in not sustaining the 18th assignment of error upon the record in said cause, which is as follows, to-wit:

"18. The Court erred in making the following finding of fact:

'7. That Knight, Yancey & Company retained the genuine bills of lading for the said cotton in their own possession, and that it was their intention to suppress them and to allow the buyers to claim the cotton on the forged bill of lading attached to the drafts above mentioned.'

There was no evidence in the cause which would support said findings."

Tenth.—Said Circuit Court of Appeals erred

in not sustaining the 19th assignment of error upon the record in said cause, which is as follows, to-wit:

"19. The Court erred in making the following finding of fact:

'8. That all right, title and interest of Knight, Yancey & Company to the said 1,400 bales of cotton had passed out of them and that they had no lien or claim of any kind upon it before their adjudication in bankruptcy.'

Said finding was in conflict with the agreed statement of facts on which the cause was tried."

Eleventh.—Said Circuit Court of Appeals erred in not sustaining the 20th assignment of error upon the record in said cause, which is as follows, to-wit:

"20. The Court erred in finding:

'9. That the Trustee has no right, title or interest in or two, or claim upon, the said cotton of any nature whatsoever.'

Said finding is in conflict with the uncontradicted evidence in the cause."

Twelfth.—Said Circuit Court of Appeals erred in not sustaining the 21st assignment of error upon the record in said cause, which is as follows, to-wit:

"21. The Court erred in making the following finding:

'10. That Knight, Yancey & Company and their Trustee, plaintiff herein, are estopped to assert any right, title or interest in or to the said 1,400 bales of cotton.'

There is no evidence in the record which will support said finding."

Thirteenth.—Said Circuit Court of Appeals erred in not sustaining the 22nd assignment ot error upon the record in said cause, which is as follows, to-wit:

"22. The Court erred in overruling plaintiff's motion to set aside the findings of fact filed by it in the cause and to find that the Trustee had the right, title and interest in the cotton, the subject matter of the suit, at the time that same was seized pursuant to the order of the District Court."

Fourteenth.—Said Circuit Court of Appeals erred in not sustaining the 23rd assignment of error upon the record in said cause, which is as follows, to-wit:

"23. The court erred in granting defendant's motion to enter judgment for the defendants for their costs."

Fifteenth.—Said Circuit of Appeals erred in holding that the cotton in controversy became, prior to the adjudication in bankruptcy, the property of the spinners (interveners herein), and that, hence, it could not have been lawfully transferred by the bankrupts, nor was it subject to levy and sale under judicial process against them.

Sixteenth.—Said Circuit Court of Appeals erred in holding that the bankrupts were estopped from claiming the title to the cotton in controversy, and that their trustee was likewise estopped and that he, the said trustee, stood in the shoes of and occupied

no better position than the bankrupts themselves.

Seventeenth.—Said Circuit Court of Appeals erred in holding that the spinners (interveners herein), although ignorant of all of the circumstances, were and are presumed to have waived the performance of the conditions precedent as to (a) time of delivery, (b) the effecting of insurance for their benefit, (c) the delivery to them of Liverpool Conference Bills of Lading to evidence the shipment because, in view of the subsequent bankruptcy of Knight, Yancey & Company, it resulted and turned out that such waiver would have been and was of advantage to the spinners (interveners herein).

Eighteenth.—Said Circuit Court of Appeals erred in holding that Knight, Yancey & Company intended, by delivering the actual cotton to the carriers, to appropriate same to their contracts with the spinners (interveners herein); and, furthermore, the said Circuit Court of Appeals erred in holding, even if Knight, Yancey and Company had such intention, that same operated to transfer title from Knight, Yancey & Company to the spinners (interveners herein) as against the creditors of Knight Yancey & Company and their trustee in bankruptcy.

Nineteenth.—Said Circuit Court of Appeals erred in holding that the action of the spinners (interveners herein) after the adjudication in bankruptcy, and after said adjudication was known to them, could have any effect in changing the statutus of the parties or in vesting title which had not vested previous to the adjudication in bankruptcy.

## The Right to the Writ of Error.

The jurisdiction of the Circuit Court of Appeals is final only when Federal jurisdiction depends entirely on diversity of citizenship (and in other cases which do not affect this one). It is submitted that in this case two grounds of Federal jurisdiction other than diversity of citizenship existed and were apparent on the face of the petition, they being:

First: The defendants consented to be sued in the Circuit Court by the Trustee, as authorized by Section 23-b of the Bankruptcy Act.

Second: The suit was on a bond given in litigation arising in the Federal Courts, so that the suit arose under the Constitution and laws of the United States.

The right to review the judgments of the Circuit Court of Appeals is thus defined by statute:

By the 6th section of the Act of 1891, establishing the Circuit Court of Appeals (26 Stat. at L. 828; 4 Fed. Stat. An. p. 409) it is provided:

> "And the judgments or decrees of the Circuit Court of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states; also, in all cases arising under the patent laws, under the revenue laws and under the criminal laws, and in admiralty cases." Re-enacted as Sec. 128 Judiciary Act of 1911.

It is provided at the end of Section 6 of the Circuit Court of Appeals Act (26 Stat. at L. 828; 4 Fed. Stat. An. p. 409):

"In all cases not hereinbefore in this section made final, there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the amount in controversy shall exceed one thousand dollars besides costs." Re-enacted in Sec. 241 of the Judiciary Act of 1911.

In Henigson vs. U. S. Fidelity Co., 208 U. S. 404, 52 L. Ed. 547, it was held that an appeal from the Circuit Court of Appeals to the Supreme Court would not be dismissed where the grounds of Federal jurisdiction were both diversity of citizenship and a controversy involving statutes of the United States. Judge Brewer said:

"A motion is made to dismiss on the ground that the jurisdiction of the Circuit Court was invoked solely on the ground of the diversity of citizenship of the parties and hence the decree of the Circuit Court of Appeals was final. The motion must be overruled. Diversity of citizenship was, it is true, alleged in the bills, but grounds of suit and relief were also based on the statutes of the United States, as from the discussion of the merits will be seen. Those statutes entered as elements into the decision of the Circuit Court of Appeals and were necessary elements."

In Northern Pacific Ry. Co. vs. Soderberg, 188 U. S. 526, 47 L. Ed. 575, overruling a motion to dismiss an appeal from the Circuit Court of Appeals, it was held that the decision of the Circuit Court of Appeals was not final unless the jurisdiction of the Federal Courts was dependent *entirely* upon diverse citizenship.

It is clearly the purpose of Section 23-b of the

Bankruptcy Act to confer on the Federal Courts jurisdiction of suits by a trustee in bankruptcy where a defendant consents to be sued therein, whether such Courts would otherwise have jurisdiction or not.

This section is as follows:

> "b Suits by the trustees shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, *unless by consent of the proposed defendant*, except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e, and section seventy, subdivision e."

In Spencer vs. Duplan Silk Co., 191 U. S. 526, 48 L. Ed. 287, it was held that the mere fact that a suit was brought by a trustee in bankruptcy, would not make the suit one under Federal statutes, so that there would be an additional ground of Federal jurisdiction to that caused by the diversity of citizenship of the parties. But the Court in this case calls attention to the fact that there was no consent of the defendant to the institution of the suit in the Federal courts, and clearly intimates that if there had been such consent the right to review would exist, in this language:

> "Plaintiff brought his action in the state court, and its removal on the ground of diverse citizenship placed it in the Circuit Court as if it had been commenced there on that ground of jurisdiction, *and not as if it had been com-*

*menced there by consent of defendant under Sec. 23 of the bankruptcy act."*

The consent of the defendants to be sued in the Federal Courts arises out of the following facts:

The cotton was found by the Receivers in Bankruptcy of Knight, Yancey & Company at New Orleans about to be carried out of the United States. Upon the application of these Receivers, the District Court of the United States at New Orleans enjoined the Master and Agents of the Steamship on which the cotton was being loaded from removing it. It was provided in this injunction order that the cotton might be removed under conditions as follows:

> "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the respondents, the Master of the S. S. "Ingelfingen" and the Richard Meyer Co., Agents of said Ship, may move said cotton from the jurisdiction of this Court, notwithstanding the foregoing provisions of this order, provided said respondents, or either of them, shall pay into the registry of this Court the value of said cotton, or furnish a bond with surety acceptable to this Court for the present cash value of the cotton referred to in the pleadings. Said bond shall be conditional upon the payment of the principal sum thereof, or such part thereof as the Court may direct, by the surety thereon to the Receivers of Knight, Yancey & Company, in bankruptcy, or to such trustee as may hereafter be elected or appointed, if, in a suit or action at law or in equity, that may or shall hereafter be brought in the Circuit or District Court of the United States for the Eastern District of Louisiana, by the Receivers in bankruptcy of said Knight,

Yancey & Company, or the trustee or trustees in bankruptcy of said Knight, Yancey & Company against the surety on said bond, it shall be adjudged that the said receivers or said trustee or trustees of said Knight, Yancy & Company, have the right, title or interest to said cotton, or any part thereof." Record, pages 144-145.

The bond contemplated by this portion of this order was given with the defendants Isidore Newman & Son and E. A. Neugass as sureties. (Record pages 149-150).

By executing this bond *these defendants consented to be sued in the District or Circuit Courts of the United States for the Eastern District of Louisiana by the Trustee or Trustees of the bankrupt estate of Knight, Yancey & Company in an action to try the title to this cotton*, the language of the bond implying such consent being: "if, in a suit or action at law or in equity that may or shall hereafter be brought on this bond by said Receivers or by said Trustee or Trustees, or by said Estate in bankruptcy *against the obligors herein or either of them* in the Circuit or District Courts of the United States for the Eastern District of Louisiana," etc.

The suit brought before the Supreme Court by the writ of error was on this bond and by the petition by which this suit was begun (Record, pages 1-7) this bond and the proceedings in which it was given are fully set forth. So that the consent of the sole defendants to the suit as it was brought, viz: Isidore Newman & Son and E. A. Neugass, appears on the face of the record. After the suit was called for trial the Italian Spinners named in the caption of the suit as Intervenors, *on their own motion* (Record,

page 30)were made parties defendant to the case.

In Wier vs. Rountree, 216 U. S. 607, 54 L. Ed. 635, it was held that if the allegations which set up diversity of citizenship were stricken from the bill, the Federal Court would have had no jurisdiction.

Applying this test to the present case, if the allegations as to the diversity of citizenship of the parties were stricken from the petition, the Court would still have jurisdiction by consent. This consent was of avail to give jurisdiction solely by virtue of the provision of Sec. 23-b of the Bankruptcy Act. With this consent apparent in the pleadings, and without any allegations of diverse citizenship of the parties, the Court would not have dismissed the suit for want of jurisdiction, though without either diverse citizenship or consent under Sec. 23-b apparent on the record the Court would have dismissed the suit, *although defendants voluntarily appeared and raised no jurisdictional question.*

Mansfield etc. Ry. Co. vs. Swan, 111 U. S., 379-382.
Great Sou. Fire Proof Hotel Co. vs. Jones, 177 U. S., 449-453.
Metcalf vs. City of Watertown, 128 U. S., 586.

In re: Connolly, 100 Fed. Rep. 620, 3 A. B. R., 842, which was a proceeding by a Trustee to recover property claimed to belong to the bankrupt estate, the District Judge held that the Court had acquired jurisdiction by consent. The opinion states that the respondent filed an answer on the merits. *He filed a bond conditioned to surrender the property if the controversy should be adjudged against him, etc.* The Court said: "Such conduct is certainly con-

sent, and while it is usually true that consent cannot give jurisdiction, this is not universally true. The rule has no application when a statute clearly implies as does Sec. 23, that the jurisdiction of a certain class of controversies may be given by consent, for, in such event, to apply the rule would be to make the statute of no effect."

It has been held that a Federal Court may acquire jurisdiction by the consent of the defendant to a suit by a Trustee in bankruptcy of which it would not otherwise have jurisdiction, as a result of the defendant's appearance and pleading to the merits in

Detroit Trust Co. vs. Pontiac Savings Bank, 196 Fed. Rep. 29 (C. C. A.)
Booneville National Bank vs. Burke, 107 Fed. Rep. 891 (C. C. A.)
In re White
177 Fed. Rep. 194 (C. C. A.)
Haffenberg vs. Chicago Title & Trust Co., 192 Fed. Rep. 874 (C. C. A.)

But for the giving of the bond on which the defendants were sued there would have been nothing over which the Circuit Court would have had jurisdiction. The suit was not one for the recovery of property; the cotton was not in the jurisdiction of the Court when the suit was brought. Nor was the bond one to have the property forthcoming. The bond defined the suit which might be brought on it, and the Courts in which it might be brought. But for their own consent the defendants could not have been sued at all.

The second ground of Federal jurisdiction, other than diversity of citizenship, apparent on the face

of the petition was that the suit arose under the Constitution and laws of the United States in that it was a suit to enforce a bond given in an equity suit in a Federal Court pursuant to the Court's order.

In Leslie vs. Brown, 90 Fed. Rep. 171 (C. C. A., 6th Circuit), which was an action at law in the United States Circuit Court on an injunction bond given in an equity suit in the same Court, Judge Taft said: "We have no doubt that an action at law in the Federal Court may be brought on such a bond, provided the necessary amount is involved, on the ground that the plaintiff is enforcing rights secured to him under the Constitution and laws of the United States."

In Tullock vs. Mulvane, 184 U. S., 497, it was held that it was by virtue of the equity rules of the Supreme Court that indemnity on the grant of injunction was demanded. Inferentially it would seem that it is by virtue of the same rules that indemnity may be provided for the opposite party on the dissolution of an injunction. The Court further held in that case that the case, which was a suit on such an injunction bond, was reviewable by the Supreme Court, on error to a State Supreme Court, in that the claim of immunity from liability for attorney's fees as one of the elements of damage under the injunction bond presented a Federal question. In this connection the Court, through Mr. Justice White, said:

> "It is insisted, however, that such is not the case (that no Federal question is involved), because, whilst it is true the courts of the United States exercise their authority under the Constitution and laws of the United States, that,

as there is no express statutory authority regulating injunction bonds, therefore in determining the measure of liability on them no claim of immunity arising from an authority exercised under the United States can arise. But this is a mere form or restating the contention we have already disposed of. The test is not the particular source or form by which the authority of the United States has been conferred or is exerted, but whether such authority existed and was exercised and an immunity is claimed under it.

"Besides, by express provision of the Revised Statues (Sec. 617) proceedings of the courts of the United States in equity causes are subject to regulation by this court, with power to modify and change such rules. And rule No. 90, promulgrated under the authority thus conferred, provides as follows:

" 'In all cases where the rules prescribed by this court or by the Circuit Court do not apply, the practice of the Circuit court shall be regulated by the present practice of the High Court of Chancery in England, so far as the same may reasonably be applied consistently with the local circumstances and local conveniences of the district where the court is held, not as positive rules, but as furnishing just analogies to regulate the practice.'

"And it is by the force and effect of this rule that the equity courts of the United States exercise their power with respect to the exaction of security when granting writs of injunction. Russell vs. Farley, 105 U. S. 433, 26 L. Ed., 1060.

"It follows that proceedings in courts of equity of the United States are regulated by rules promulgated by this court deriving their force from statutory authority, and the argument which we have just considered, even if it were not erroneous, would be inapposite."

The cases on the subject under discussion are reviewed in Files vs. Davis, 118 Fed. Rep., 465.

It is therefore, submitted that the case is in the Court for review as a matter of right.

**Practice Where Review as a Matter of Right and Certiorari are Both Sought.**

If the Court deems the question of the right to the review difficult, but deems the case of sufficient importance to justify its review, it will grant the writ of certiorari without passing on the petition to dismiss.

White Smith Music Co. vs. Appollo Co., 209 U. S., 1;
Montana Mining Co. vs. St. Louis Mining Co., 204 U. S., 204.

And even where the Court holds that an appeal should be dismissed, it will if the writ of certiorari has been applied for and the Court deems the case one justifying its review, dismiss the appeal but at the same time grant the writ of certiorari.

Farrell (O'Callaghan) vs. O'Brien, 199 U. S., 101.

**A Summary of the Argument on the Merits.**

**I.**

The cotton was admitted to be the property of Knight, Yancey & Company, the bankrupts, at the time of its shipment. They neither then nor thereafter did anything to part with the title. They did not communicate with the spinners (the claim-

ants), nor the spinners with them. Their title continued until their bankruptcy when it was vested in the Trustee by operation of law. They affirmatively indicated a purpose to retain the title by taking bills of lading for the cotton by which it was made deliverable to their order, and by using some of these bills of lading as collateral security for advances made them by a bank, and by retaining all the bills until their bankruptcy, the cotton then being in transit. *The cotton* was not the subject of any sale or agreement made by the bankrupts. That they may have intended to use it *by acts thereafter to be done* to cover up, or to undertake to cover up frauds they had previously committed, does not affect the case. The persons they defrauded were ignorant of the existence of the cotton and ignorant of the fact that they had been defrauded. Their relations to the bankrupt were those of creditor and debtor. The bankrupts could not without their knowledge or consent transfer property to them, presuming the means adopted were effectual to so transfer it, which they were not, in satisfaction of the frauds or in satisfaction of the contracts which made those frauds possible, the contracts having been previously breached by the bankrupts. To so hold would be to hold that a bankrupt can by his secret act *in effect* prefer one creditor over another.

## II.

The spinners undertake to show a divestiture of title out of the bankrupts under the contracts made by the broker's notes of sales, by showing the acts of Knight, Yancey & Company in the ship-

ment of cotton in March and April, 1910, and by claiming that such shipment was an appropriation to the contract evidenced by the said notes and by estoppel arising out of their acts. (See answer of the respondents, and particularly first paragraph on page 22 of transcript.)

III.

The spinners can sustain this burden only by showing that *this* cotton was sold under the executory contracts mentioned, that is that it was delivered to the carrier pursuant to the terms of those contracts, and to show this they must show that it was delivered at the time and place called for n those contracts, that it was insured as therein provided for and that conference bills of lading for it, entitling the spinners to demand it of the carrier, were delivered to them.

Williston on Sales, Sec. 227.

IV.

They fail to show a compliance with the condition as to delivery in time, because it affirmatively appears that the contracts required delivery in January or February, and the delivery, in fact, was made in two instances in the latter part of March and in the other instances in April.

V.

The failure to deliver in time was the failure to perform a condition precedent, and such failure prevented the title to the cotton from passing from the bankrupts to the spinners.

Norrington vs. Wright, 115 U. S., 188;
Filley vs. Pope, 115 U. S., 213;
Ashmore vs. Cox, L. R. (1899) 1 Q. B., 436;
Henderson vs. McFadden, 112 Fed., 389;
Hull Coal Co. vs. Empire Coal Co., 113 Fed., 256.

## VI.

Not only is such non-compliance a breach of the condition precedent giving a right to the vendees (the spinners) to refuse to receive the goods but it prevents the title from passing from seller to buyer.

Sneathen vs. Grubbs, 88 Pa., 147;
Alsberg vs. Latta, 30 Iowa, 442;
Hoover vs. Maher, 51 Minn., 269; 53 N. W., 646;
Soper vs. Creighton, 93 Man., 564;
Porter vs. Edwards, 29 Hun., 509;
Note 31 L. R. A. (N. S.), 942;
Williston on Sales, Sec. 278, p. 400-1;
Benjamin on Sales, Secs. 505-6;
Mechem on Sales, Sec. 746.

## VII.

Not only did the bankrupts fail to comply with the foregoing condition precedent, but they also failed to insure. The contracts c. i. f. involved the obligation upon the bankrupts to insure.

Bowden Bros. vs. Little, 4 Comm., 1364
(High Court of Australia, 1907).

The breach of the condition precedent prevented the title passing.

McDonald vs. Pearre Bros. Co., 62 S. E., 830;
Clark vs. Hutchins, 14 Eastman, (Exch.), 475;
New York Tartar Co. vs. French, 154 Pa. St., 273; 26 Atl., 425.

VIII.

There was also a breach of this condition precedent that the bankrupts should deliver to the spinners conference bills of lading. There was no delivery of any bills of lading; but Knight, Yancey & Company retained those given by the Southern Railway Company. Without such bills, the spinners could not have demanded the delivery of the cotton by the carrier, and it was essential, therefore, that they should have such bills.

Thames vs. Seaman, 14 Wal., 98;
Northern Pa. R. R. Co. vs. Commercial National Bank, 123 U. S., 727;
Atchison, Etc., R. R. Co. vs. Schriver, 84 Pac., 119; 4 L. R. A. (N. S.), 1056, and note;
Young vs. East Ala., R. R. Co., 80 Ala., 100;
Altantic Coast Line, vs. Dahlberg Brokerage Co., 54 So. Rep., 169 (Ala.);
Forbes vs. Boston & Lowell R. R., 133 Mass., 154;
Wright & Colton Wire Cloth Co. vs. Waren, 177 Mass., 283; 58 N. E., 1082;
Furman vs. Union Pac. R. R., 106 N. Y., 579.

IX.

Compliance with like conditions precedent such as those relating to the place of delivery and the

quality of the goods, have been held essential to a passage of title.

Belding Hall Mfg. Co. vs. Mercer & Ferdon Lumber Co., 175 Fed., 388; 99 C. C. A., 123;
Jones vs. Schneider, 22 Minn., 279;
Williston on Sales, Sec. 277, page 390; Sec. 278, pages 400-1.

## X.

The spinners attempt to distinguish some of the foregoing authorities from this case by saying that they were merely announcements that the failure to deliver in time or at the proper place, or to insure, etc., were conditions precedent and did not decide that such failure prevented the passage of title. It is quite clear, however, that if there were breaches of the conditions precedent, and as the spinners were not required to accept the goods under the changed conditions, then the title did not pass because such result would be a forcing of the title upon the spinners before their acceptance and acquiescence were given.

## XI.

The contention of the spinners that a delivery to the carrier was a delivery to the agent of the spinners, and, therefore, a consummation of the passage of title is not tenable for the reason that the carrier is the agent of the consignee only when the vendor delivers goods complying with the contract in the manner of delivery and the other material conditions, such as insurance, etc.

## XII.

While in our view the retention of the bills of lading by Knight, Yancey & Company was conclusive evidence of their intention not to appropriate this cotton to any contract theretofore made with the spinners, yet, also in our opinion, the intention of Knight, Yancey & Company is entirely unimportant unless accompanied by and followed with acts which in fact and in law perfect a delivery. If such acts were not in strict compliance with the conditions of the contract, then they could only effect delivery with the assent of the spinners.

"The Frances," 8 Cranch, 359; Ibid, 8 Cranch, 354.

## XIII.

The act of Knight, Yancey & Company in endeavoring to ship cotton not complying with the conditions above mentioned was merely a tender (presuming that under the mode of shipment the cotton was placed at the disposal of the spinners, which it was not) to the spinners to induce them to accept the cotton under the changed conditions. It was at most an offer to make a new contract; and, unless that offer was accepted by the spinners, no new contract was made by which title vested.

## XIV.

The spinners deny all the propositions above to the effect that the failure to comply with conditions precedent prevents the vesting of title, and say that the title vested in spite of such failure. They also

say that the failure was waived. The two things are inconsistent. If the title vested *eo instanti* by the tender by Knight, Yancey & Company, there is no necessity of resorting to the doctrine of waiver, as nothing had to be waived.

No waiver can be operative unless the party invoking it knew of the default which he was waiving.

29 Am. & Eng. Ency. of Law, 1105; 1091;
Bennecke vs. Connecticut Mutual Life Ins. Co., 105 U. S., 305;
29 Am. & Eng. Ency. of Law, 1093;
Belding Hall Co. vs. Mercor-Ferdon Co., 175 Fed., 338.

## XV.

In this case there was no communication between Knight, Yancey & Company and the spinners, directly or indirectly, and no action by the spinners in connection with their contracts or the delivery of cotton from the time of the payment of the drafts drawn against the spurious bills up to the time of their intervention in the proceedings under which the cotton was seized. Hence, there was no acceptance of the proposal by Knight, Yancey & Company to change the terms of the contract and thus vest title in the spinners until after the bankruptcy proceedings. This came too late.

Belding Hall Co. vs. Mercer-Ferdon Co., 175 Fed., 338; 99 C. C. A., 123;
Low vs. Pew, 108 Mass., 349;
Acme Harvester Co. vs. Beekman Lumber Co., 222 U. S., 300;
Porter vs. Boyd, 171 Fed., 305.

## XVI.

This will be true because at the time of the adjudication in bankruptcy the property was subject to levy under judicial process; section 70-a Bankrupt Act, 1898, which provides as follows:

> "The Trustee of a bankrupt estate is invested upon his appointment and qualification by operation of law with the title of the bankrupt as of the date he was adjudged bankrupt, * * * to property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

This was the law without any reference to the amendatory act of 1910. That was the law as it existed and was passed upon in Security Warehousing Company vs. Hand, 206 U. S., 415.

> Knapp vs. Milwaukee Trust Co., 216 U. S., 557.

## XVII.

If, however, it can be said that any interest in the cotton vested in the spinners by the acts of the bankrupts by the same acts the bankrupts reserved the power to dispose of the cotton by taking bills of lading by which the cotton was deliverable to their order and by retaining those bills. Such course rendered the conveyance void as to both existing and subsequent creditors of the bankrupts under Section 4287 of the Code of Alabama, which is as follows:

"All deeds of gift, all conveyances, transfers and assignments verbal or written, of goods, chattels or things in action made in trust for the use of the person making the same *are void against creditors existing or subsequent of such person.*"

Conveyances of property where the grantee expressly or impliedly reserved the right to dispose of the property conveyed have uniformly been held offensive to the statute.

Benedict vs. Renfro, 75 Ala., 121;
McDermott vs. Eborn, 90 Ala., 258;
Birmingham Dry Goods Co., vs. Roden, 110 Ala., 511;
O'Neil vs. Birmingham Brewing Co., 101 Ala., 383;
Truitt vs. Cook, 129 Ala., 377;
Christian, Etc., vs. Michaels, 121 Ala., 84.

## XVIII.

Chattels conveyed in violation of Sec. 4287 of the Code of Alabama are subject to execution. "It has been the law all along in England and in this State that tangible personal property—goods and chattels—could be levied on at law in the hands of a fraudulent transferee, and that a sale thereof under the execution would convey a perfect title to the purchaser."

Hall vs. Ala. Terminal, Etc., Co., 143 Ala., 474-475;
Freeman on Executions, Section 136;
King vs. Kenan, 38 Ala., 63;
Reynolds vs. Crook, 31 Ala., 634;
Constantine vs. Twelves, 29 Ala., 607.

## XVIII-A.

By the terms of the statute the conveyance made where the grantor reserves a benefit is void as to both existing and subsequent creditors. It is not necessary by the terms of the statute that the claims of the creditors be in judgment at the time of the conveyance. Nor is it necessary that there be an actual intent to hinder, delay and defraud creditors. And it is immaterial whether the grantor is solvent or insolvent.

Freeman on Executions, Sec. 143;
Roden vs. Norton, 128 Ala., 129-138;
Sandlin vs. Robbins, 62 Ala., 477; 484-5.

## XIX.

The bankrupts had reserved this actual power of disposition. They had exercised it by pledging the bills for part of the cotton and could have exercised it again.

Benjamin on Sales, Sec. 567;
Dows vs. National Exchange Bank, 91 U. S., 618;
Neimeyer Lumber Co. vs. Burlington R. R., 54 Neb., 321; 74 N. E., 670; 40 L. R. A., 534;
Note 22 L. R. A., 421-422, where the holding of many cases is given;
Jones vs. Brewer, 79 Ala., 545;
McCormick vs. Joseph, 77 Ala., 236;
Ala., G. S. R. R. Co., vs. Mt. Vernon Co., 84 Ala., 173;
Gabarron vs. Kreeft, L. R. 10 Exc., 274; 44 L. J. Exc., 238;
Wait vs. Baker, 2 Exc., 1; 17 L. J. Exc., 307;

Turner vs. Liverpool Dock Trustees, 6 Exc., 543;
Ellershaw vs. Magniac, 6 Exc., 570.

## XX.

Not only could the bankrupts transfer the cotton by transferring the bill of lading but they could control the destination of the cotton. "The request for a diversion of the consignment from Kansas City to Nashville was a demand for the property—an order from the shipper—with which it was the defendant's duty to comply."

Atchison, Topeka, etc. R. R. Co., vs. Schriver, 84 Pac., 119;
St. Jose Indiano, 1 Wheaton, 208;
Hutchinson on Carriers, Sec. 660; 661; 193.

## XXI.

In every case, the inquiry for the Court is whether the property was at the moment of adjudication subject to levy under judicial process. No matter what might be the status as between the seller and the buyer, if, under the law of the State where the sale took place, or under the common law, creditors would have the right to subject the property to judicial process, the title passes to the Trustees.

Fourth Street National Bank vs. Millbourne Mills Company's Trustee, 172 Fed., 177; 96 C. C. A., 629.

This principle is decided in all the cases relied upon by the Trustee, as well as in the York Man-

ufacturing Co. case, relied upon by the spinners.

In the York Manufacturing Company case, 201 U. S., 344, the Court found the law of Ohio to render the lien in that case

> "Void as to creditors who before its filing had fastened upon the property by some specific liens."

It then found that there were no such creditors shown to exist; and, therefore, found that the transfer or lien was valid not only as between the parties, but as against creditors, and, therefore, the property was not seizable under judicial process.

In the case of Security Warehousing Company vs. Hand, 206 U.S., 415, the Court found the element lacking which was held essential in the York Manufacturing Company case, that is the element of voidness as to general creditors, because, under the statute of Wisconsin, want of effected possession rendered the attempted transfer void as to general creditors as well as other creditors; and, necessarily, finding that there were general creditors of the bankrupt, it found that the title passed to the Trustee of the bankrupt, notwithstanding that the transaction as between the parties was good.

In this latter case, the Court comments upon the York Manufacturing Company case, and, distinguishing it in accordance with the distinction which we have just made, says:

> "Such a conditional sale was good under the Ohio law where the instrument was executed, except as to those creditors who between the time of the execution of the instrument and the filing thereof had obtained some specific

lien upon the property. There were no such creditors, and hence there was no one who could question the validity of the instrument at the time the Trustee's title would have accrued, unless it was the Trustee in Bankruptcy * * *. We held that as the conditional sale was valid by the law of Ohio, except as to a certain class of creditors, if there were no such creditors, there was no one who could question the validity of the instrument."

## XXII.

Then the question here is whether this property was subject at the time of the adjudication in bankruptcy to seizure under judicial process. It was, unless there had been a valid transfer of possession, or some valid claim, right, lien or equity acquired by the spinners prior to such adjudication. The right of acceptance or rejection of the offer made by Knight, Yancey & Company to make a new contract and accept the goods under new conditions was not such claim, right, lien, or equity in or to the property, but at most was merely a tender which was revocable by Knight, Yancey & Company and gave no right of any kind to the spinners until accepted by them. Such acceptance, as we have shown, took place, if at all, after bankruptcy and after the property was actually seized at the receiver's suit. It would seem clear that a mere right to close a contract could not defeat the title of the Trustee.

## XXIII.

On the other hand, it would seem clear that until accepted by the spinners, this offer by Knight,

Yancey & Company was revocable by them, and they could have sold the property to any third person, have mortgaged it on their own account, or in fact given it away, and that all that would have remained to the spinners was a right to a personal action for breach of contract.

## XXIV.

The only force which can be given to the so-called acts of appropriation of Knight, Yancey & Company, is to make them constitute a new offer, which would need a new assent. The spinners seek to solve this difficulty by applying their doctrine of presumed assent. Without going further into the nature and applicability of such doctrine, the presumption of assent to the acceptance of a transfer is never presumed, unless:

1. The offered transfer is without conditions. In this case the offer was necessarily on condition that the cotton be accepted in discharge of the obligations of the bankrupts; otherwise there was no consideration to support the presumed transfer.

Cravens vs. Rossiter, 116 Mo., 338.
Parmelee vs. Simpson, 5 Wal., 81-86.
Elmer vs. Sutherland, 7 Ala., 262.
Halsey vs. Fairbanks, Fed., case 5964.

2. Being a fiction, the presumption is never indulged so as to cut off rights intervening between the time of the offer and the subsequent actual assent. These intervening rights may be those of creditors in an intervening bankruptcy.

Re Kansas City Stone Co., Fed., Case No. 7610;

Parmelee vs. Simpson, 5. Wal., 81-86;
Younge vs. Gilbeau, 3 Wal., 636;
Bell vs. Farmers Bank, 11 Bush, 34;
Devlin on Deeds, Sec. 285.

3. The transfer must appear at the time the transfer is made to be beneficial to the transferee.

Hulick vs. Scovil, 4 Gillman (9 Ill.,) 159; 176-8;
Gifford vs. Corrigan, 105 N. Y., 223;
Tatlow vs. Turner, 28 Tex., 759-773;
Thompson vs. Drake, 107 Ill., 87.

It cannot be said that the assumed transfer was beneficial to the spinners because:

(a). It imposed the burden of receiving the cotton at a time when the market may have been radically and materially different from what it was when the cotton should have been delivered under the contract.

(b). It imposed the burden of the spinners paying the insurance which by the terms of the contract was to be paid as a condition precedent by the bankrupt.

(c). It imposed the risk of loss in case of fire or other destructive elements before the insurance could become effective, and it could not have become effective until the spinners were notified and had an opportunity to insure.

(d). It imposed upon the spinners the necessity of foregoing the use of the Liverpool Conference bills of lading, which were provided for by the contract and which were retained by Knight, Yancey and Company and which were never offered or tendered by them to the spinners. The deprivation

of the bills of lading deprived the spinners of a means of credit and also threw upon them the burden of litigation with the carrier if the carrier refused to deliver the property without the production of such bills, as the carrier might readily and legally have done.

The presumption of acceptance of a transfer is indulged where the transfer is to a third person for the benefit of another when it would not be indulged if such transfer were directly to such other. This is particularly true of assignments for the benefit of creditors.

> Nicoll vs. Mumford, 4 Johns., Chan., 522-529;
> Schoolfield vs. Hirsh, 14 Sou., Rep., (Miss.), 528-529.

Assent cannot be presumed to just what is beneficial to the offeree. The assent, if presumed at all, must cover the entire transaction.

> Baldwin vs. Peet, 75 Am. Dec., (Texas), 806 (817).

## XXV.

The case of Grove vs. Brien, 8 Howard, 429, cited by the Circuit Court of Appeals in support of its holding that there was a presumed acceptance of this cotton as and for the cotton the bankrupts should have shipped when they drew on the spinners, was a case where there was an assignment of goods to a third person (Wm. Towle & Sons) for and on account of the presumed acceptor (Gilmor). The goods were sent not in payment of a debt but as security, so that there was no con-

dition attached to their acceptance and the acceptance could be presumed. In this case if acceptance is presumed, the presumption must be that the goods were accepted in satisfaction of the obligation of the bankrupts to the spinners. Where the transfer is in payment of a debt, acceptance is not presumed.

Cravens vs. Rossiter, 116, Mo., 338, 38 Am., St. Rep., 606.

The reason of the presumed acceptance by creditors of the benefits of an assignment for the benefit of creditors is given in Tompkins vs. Wheeler, 16 Peters, 118.

## XXVI.

In this case if there was an acceptance it took place, as we have said, after the adjudication in bankruptcy and after the actual seizure of the cotton. It could not divest the Trustee's previously acquired title.

## XXVII.

While we do not claim in this case that there was a fraudulent preference, since such preference must occur prior to the adjudication and with the knowledge of the preferred creditor of the insolvency; yet the result of holding that a waiver by the spinners made after the bankruptcy vested the title in them as of the date of the tender by Knight, Yancey & Company is to allow them to evade the spirit of the bankrupt law and in effect to give themselves a fraudulent preference. At the time

of their waiver relied upon, they knew that the bankruptcy had occurred, and therefore, that Knight, Yancey & Company were insolvent, and with this knowledge they accepted a transfer from Knight, Yancey & Company not under and in pursuance of the original contract, but by virtue of a new offer or tender.

This case is analogous to the following cases where persons who had been defrauded of their money by a person afterwards becoming bankrupt were held to have received preferences by virtue of transfers of property made to them by the bankrupt in satisfaction of the frauds:

Atherton vs. Greene, 179 Fed., 806 (103 C. C. A., 298); 24 A. B. R., 560;
Burgoyne vs. McKillip, 182 Fed., 452 (104 C. C. A., 590); 24 A. B. R., 387;
Clingham vs. Miller, 160 F. R., 326 (C. C. A.); 20 A. B. R., 360;
Clarke vs. Rogers, 183 F. R., 518 (C. C. A.);
Upham vs. New York Loan & Tr. Co., 76 N. Y., 1;
Sharp vs. Phila Warehouse Co., Fed. Cas., 12, 709a;
Smith Tr. vs. Township of Au Gres, 80 C. C. A., 145, (150 F. R. 257);
Cases collected in note 30 L. R. A. (N. S.), 1053.

While, as we have said, we do not insist upon a fraudulent preference, these cases point to the observations made in the preceding paragraph.

## XXIX.

There is no estoppel shown which affects the

title to the cotton. No act was done by the spinners with reference to the cotton itself. They did not part with their money nor in any respect change their position on account of any representation with reference to *this actual cotton.*

2 Pomeroy's Equity, Sec. 805;
Herman on Estoppel, Sec. 799;
Thompson vs. Sioux Falls Nat'l Bank, 150 U. S., 231-24.

## XXX.

The contention of the spinners is that by estoppel title to the cotton is raised in them independently of any other method. The law of title by estoppel is applicable in cases where specific property is sold to which the seller had no title at the time of sale but to which specific property he subsequently acquires title. In such cases the subsequently acquired title passes. It means nothing to say, however, that one who has sold unascertained goods (though paid for them) on subsequently acquiring such goods is estopped to deny that they are the goods sold, because if he subsequently acquires such goods selection of those which are to pass is necessary. If there be such selection amounting to appropriation title passes without more, and it is unnecessary to invoke estoppel; if there is no such selection and appropriation there is nothing ascertained on which the estoppel can operate.

Bryan vs. Nix. 4 M. & W., 794;
Williston on Sales, Secs. 142-143-144;
Stanford vs. McGill, 72 N. W., 938;
Jackson vs. Hale, 14 How., 525;
Block vs. Shaw, 95 S. W., 806.

## XXXI.

The Idaho case, 93 U. S., 575, is, for the reason, additional to those we hereafter give, not in point, because in that case the delivery to the carrier was of cotton practically conforming to the description in the bill of lading which was relied upon and consequently the delivery was a compliance with the contract. In this case, the delivery was not a compliance with the contract, but failed in the particulars that the time was different, the cotton was uninsured and the conference bills of lading were not delivered. In the Idaho case, the delivery was without conditions. In this case, the tender was upon various conditions. In that case the title undoubtedly passed. In this case, it undoubtedly did not pass. In the Idaho case, the ship issued its bill of ladings before it received the goods. The goods were actually delivered to the ship before it sailed and the mate's receipt taken. Thereafter the goods were feloniously taken by the shippers from the possession of the ship and converted by being delivered to another ship which issued its bill of lading. The Court held that the delivery of the cotton to the first ship for which it had previously given its bill of lading or receipt was an absolute appropriation and that any subsequent taking or carrying away of the goods was an unlawful conversion, like anyother unlawful conversion of personal property might be.

### Argument.

The prima facie title of the Trustee to the cotton being necessarily conceded, the entire argu-

ment for the Trustee must be by way of reply to the spinners' contentions.

With these contentions we are familiar from previous arguments of the case. They are, stripped of all surplusage:

1. That the executory contracts of sale remained in force after the bankrupts used them as a predicate for perpetrating a fraud on the spinners and that the acquisition and shipment of the cotton by the bankrupts will be treated at the election of the spinners, expressed after bankruptcy, as a natural and legal sequence of those contracts and as having the same relation to them that the shipment of the cotton according to the terms of those contracts, taken in connection with the acts of the spinners, would have had.

2. That whether the acquisition and shipment of the cotton can be regarded as the legal sequence of the contracts, the bankrupts and their Trustee are estopped from denying that *this cotton* was the *fictitious cotton* of the drafts and the forged bills of lading.

We take up these contentions in order.

The reply to the first contention is that there is no legal sequence between what had gone before and the acquisition and the shipment of the cotton. The agreed facts on which the case was tried, which it will be presumed contain every ultimate fact legitimately bearing on the legal problem involved, show nothing on which the shipment of the cotton can, in the eye of the law, be referred to the contracts or to the circumstances surrounding the secret felony of the bankrupts. The law cannot look forward at the time of the fraud and foresee in the shipment of

the cotton as it was shipped or in any way it might have been shipped (without the knowledge of the spinners), a legal discharge of the obligations of the bankrupts then existing whether those obligations be held to be in contract or to arise out of tort, and vice versa, the law cannot find in the shipment of the cotton at the time and in the manner it was shipped a legal explanation or cause of its shipment in anything that went before. The willingness of the spinners to waive the absence of any legal casual connection between the circumstances of the fraud and the circumstances of the shipment of the cotton, can not supply its absence as against the protest of the Trustee, nor could it have, for that matter, as against that of the bankrupts, although we are fully conscious of the *ad captandum* force of the repeated insistence of the spinners in argument that the Trustee stands in the bankrupt's shoes.

We are conscious, too that the agreed facts leave an impression as being a part of a story and that the legal imagination is prone to complete it. Were it not that the opinions of the Circuit Court of Appeals and of the Circuit Court unmistakably assume as proven things not contained in the record necessary to the conclusions reached by those Courts, we should doubt the propriety of the assertion that the agreed facts are the facts in the case, and are all the facts.

The Circuit Court of Appeals said: "They (the bankrupts) knew that the genuine bills, so carefully designed to correspond with those that were spurious, *would not be necessary to insure the delivery of the cotton to the spinners.* And with this

knowledge their plain purpose was to suppress the genuine bills and permit the cotton to proceed to its destination under the forged bills, *and thus prevent exposure of the fraud* with consequences disastrous to themselves."

From what is it in the record the Court can conclude that it was not necessary for the spinners to be in possession of the bills of lading issued by the carriers for this cotton in order to demand its delivery? The carrier knew its own bill of lading, and, in the absence of the cotton being the cotton of the spinners regardless of the documentary evidence of title to it so that the carrier would be justified in delivering it, without the production of those documents (a subject we shall presently refer to), the production of the carrier's bills of lading was necessary to secure delivery of the cotton.

This position is supported by the Thames vs. Seaman, 14 Wall., 98. In this case cotton was shipped from Savannah to New York by bill of lading, by the terms of which the cotton was deliverable to the shipper's order. On the ship's copy of the bill of lading was an endorsement "For Bennett, Van Pelt & Company," and the cotton was delivered to them without the production of the bill of lading duly endorsed. The copy of the bill of lading which was issued to the shippers did not have the endorsement on it "For Bennett, Van Pelt & Company." The Court said:

> "The engagement of the ship with the shipper was to deliver the cotton in New York to order. In regard to this there is no doubt. * * * * The contract between the ship and the shipper is that which is contained in

the bills of lading delivered. The ship's bill was delivered only for its information and convenience,—not for evidence, as between the parties, of what their agreement was. If it differs from the others, they must be considered as the true and only evidence of the contract * * * *.

"No argument is needed to show what is most manifest, that the delivery which was thus made was a breach of the ship's contract. By issuing bills of lading for the cotton, stipulating for a delivery to order, the ship became bound to deliver to no one who had not the order of the shipper, and this obligation was disregarded instantly on the arrival of the ship. And it is no excuse for a delivery to the wrong persons that the endorsee of the bills of lading was unknown, if indeed he was, and that notice of the arrival of the cotton could not be given. Diligent inquiry for the consignee, at least, was a duty, and no inquiry was made.

"Want of notice is excused when a consignee is unknown, or is absent, or cannot be found after diligent search. Fisk vs. Newton, 1 Denio, 45; The Peytona, 2 Curtis, 21. And if, after inquiry the consignee or the indorsees of a bill of lading for delivery to order cannot be found, the duty of the carrier is to retain the goods until they are claimed or to store them prudently for and on account of their owner. He may thus relieve himself from a carrier's responsibility. Galloway vs. Hughes, 1 Bai, 553; 1 Conkl. Adm., 196; Fisk vs. Newton, supra. He has no right under any circumstances to deliver to a stranger."

For other authorities see Proposition VIII, ante.

Nor could the spinners have demanded the

cotton of the carrier, had it arrived at Genoa as being its true owners, though not its consignees, because the title had not passed to them.

It had not passed to them because, in the first place, the shippers by taking bills of lading to their own order for it and retaining these bills of lading (except for the time that part of the bills were in pledge to a bank as collateral security when the title to the bales represented by those bills was in the bank) retained the title to the cotton, or as the books say retained the *jus disponendi.*

**The Jus Disponendi is Title.**

"It is commonly said that the seller by taking the bill of lading in his own name reserves the *jus disponendi* or right of disposal of the goods, and the latter expression is used in the section of the English Sale of Goods Act corresponding to that hereunder discussion. There seems no doubt that the selller who thus consigns the goods to himself has complete control over them, and that the so-called *jus disponendi* is in fact title. The seller may not only retain the goods until the buyer performs his obligation under the contract, but may, even in violation of the contract, dispose of them to third persons. If the seller does this, of course he is liable in damage to the buyer, but the second purchases from the seller acquired an indefeasible right." Williston on Sales, Sec. 283, page 415.

We proceed to a discussion of some of the cases in which the principles we refer to are declared.

Prize cases involving the inquiry as to whether the title to captured property was in an enemy or a neutral have in a number of instances turned on

the form of the bill of lading under which the captured goods were carried. One of these cases is the St. Jose Indiano, 1st Wheaton, 208.

In this case, it appears that a citizen of Brazil named Lizaur had consigned hides to Messrs, Dison Bros. & Company, English subjects, at Liverpool, for sale, the proceeds to be used in purchasing a bill of goods bought by Lizaur through Dison Bros. & Company, which were to be shipped to him. The cost of the goods so purchased for Lizaur was greater than the proceeds of his hides, so, in shipping these goods, Dison Bros. & Company shipped them as follows: "Consigned to Messrs, Dison Bros. & Finnie, by order, and for account of J. Lizaur."

The goods were captured during the war of 1812, and the question was whether they should be condemned as the property of the consignors, Dison Bros. & Company, English subjects, or should be released as the property of the neutral, Lizaur. The Court held that under the form of shipment, the title to the goods had not passed to Lizaur, and they remained the property of Dison Bros. & Company, and were subject to be condemned as a prize. In the course of the opinion, Judge Story said:

> "But where a merchant abroad, in pursuance of orders, either sells his own goods or purchases goods on his own credit (and thereby in reality becomes the owner), no property in the goods vests in his correspondent until he has done some notorious act to divest himself of title, or has parted with the possession by an actual and unconditional delivery for the use of such correspondent. Until that time he has in legal contemplation the exclusive property, as well as possession; and it is not

> a wrongful act in him to convert them to any use which he pleases. He is at liberty to contract upon any new engagenents, or substitute any new conditions in relation to the shipment. These principles have been frequently recognized in prize causes heretofore decided in this Court."

Numerous cases, including a number decided by this Court to the same effect, are cited under proposition XIX, page 35.

The spinners reply to the argument that by shipping the cotton to their own order the bankrupts reserved the title by saying that while the form of the bill of lading is "almost conclusive" (as said in Dows vs. National Exchange Bank, 91 U. S., 214), this form is open to explanation and that title may may be shown to have passed notwithstanding the form of the bill of lading. The principle declared is sound but the trouble is with the explanation offered in this case. It is not a legal explanation of the fact of the shipment of cotton in March and April of certain marks to say that in the preceding January and February the bankrupts defrauded the spinners by the device described in the agreed facts.

That the means taken to defraud the spinners were carefully devised, that the fraudulent documents were carefully prepared as pointed out by the Circuit Court of Appeals, is not denied; that they were calculated to deceive and did deceive was admitted; but it does not follow that the entire good faith of the spinners or the corresponding knavery of the bankrupts, whether it be regarded as ingenious or clumsy, would account for the existence of the cotton sought to be recovered, or affect

the title to it. The Circuit Court of Appeals says that by shipping the cotton in the manner they did the bankrupts intended to prevent the exposure of their fraud with consequences disastrous to themselves. With the defeat of this purpose, was the title retained or did it pass? Or rather how could the unexecuted intention of the bankrupts to cover up their fraud make the cotton that of the spinners?

The conclusion that the shipment of the cotton corresponding in certain particulars with the fictitious cotton of the drafts and bills of lading *was not accidental, is not a solution of this case.* For it to be admitted that such shipment can be deemed part of a scheme to cover up the fraud will not effect the result of the case. At best what had been done was in preparation for covering up the fraud. Had the bankrupts gone further and sent the bills of lading to the spinners or had they directed the carrier to deliver the cotton to them and thereafter it had been received and accepted by the spinners would have brought about a state of facts on which the judgment of the Court is not sought in this suit. On the other hand, it cannot be said that the secret devices of a wrong-doer, however ingenious, to repair a wrong are effectual in law to accomplish that result in the necessary absence of consent by the aggrieved person to the reparation. *Ex parte* intention has never been held to effect a transfer of the title to property in discharge of legal obligations however arising.

This is illustrated by Ellershaw vs. Magniac, 6 Exc., 569.

(Commented on by Benjamin in Sec. 553.)

A merchant of Leeds bought linseed at Odessa

to be shipped by a vessel chartered by him. He paid half the price of the goods but the seller procured the captain to sign a bill of lading and obtained money on it. The suit was between the holder of the bill and the purchaser.

> "The court, however, were of the opinion that there was not such a delivery of the goods as to vest the property or right of possession in the plaintiff; the circumstances of the shippers making the linseed deliverable to order by the bill of lading clearly showing their intention to reserve the right of the property and possession in themselves until they had made an assignment of the bill of lading to some other person; and though the goods might have been purchased with an intention that they should be delivered to Ellershaw, that intention was never executed."

And in Dows vs. National Exchange Bank, 91 U.S., 618, on page 636, it is pointed out that while it might have been originally the intention of both seller and buyer in that case that title to the goods to be shipped should immediately pass, that since shipper took bills of lading to his order "it was still in the power of the vendor to change the destination of the property until delivery was actually or at least symbolically made, *and that the intention, if any ever existed, was never carried out, the bills of lading prove.*"

The sole effect in law of taking a bill of lading to the shipper's order is not, as contended by the spinners, to secure the price, but such course may be from a variety of motives, the effect being always the same. The principle has been well stated as follows:

"This reservation of the title by the seller may be prompted by any one of a number of motives and may have a variety of effects. Its ordinary purpose, undoubtedly, is to coerce payment of the price by retaining title until payment. In addition to this main purpose and effect, it may have several incidental or collateral effects. It may, for example, determine when and where the title has passed and the sale has been completed within the purview of local statutes forbidding or restricting sales, as in common case of the statutes forbidding or restricting sales of intoxicating liquors. It may also determine whether or not the goods have become taxable or leviable as the property of the vendee. And in addition to these, as will be seen, it may give to the vendor a wide power of making pledges, sales or mortgages of the goods before they become the property of the original vendee." 1 Mechem on Sales, Sec. 777, page 653.

We have undertaken thus far to demonstrate that the spinners could not have demanded the delivery of the cotton to them because they did not hold the bills of lading for it, and could not have demanded its delivery as being its true owners, because the bankrupt shad, under the uncontradicted evidence, reserved the title to it on shipping it, and shall now proceed to the argument that the spinners could not have demanded the cotton as being its true owners by virtue of the so-called appropriation of it by the bankrupts to the contracts of sale, because this cotton was not the subject of any contract, express or implied, between the bankrupts and the spinners.

## The Cotton was not the Subject of Any Contract Between the Spinners and the Bankrupts.

The argument on this score is succinctly stated in paragraphs II. et seq. of the summary of the argument and it will be amplified principally by quotations from the authorities.

The principle called to their aid by the spinners may be stated as follows:

Where an executory contract of sale is made for the purchase of unascertained goods under an express or implied contract that the seller is to select, set aside and designate the goods agreed to be sold, upon the selection, setting aside and designation of these goods, pursuant to the contract of sale, with the intention of both parties that title shall pass, it does then pass to the vendee.

The effort to apply this principle to the case at bar must fail for a number of reasons. Primarily because there cannot be found in this case a meeting of the minds of the parties as to the terms of a contract which contemplated a selection of the cotton by the bankrupts and a selection and shipment in accordance with those terms. If there is no express assent of the purchaser to the seller's selection, etc., then in order for such assent to be presumed the terms of the contract of sale with reference to it must be followed.

The law on this subject is thus laid down:

### General Rules as to Appropriation.

"As a general rule, however, some act of appropriation of the goods to the buyer, other than mere completion or preparation, is essential for

the transfer of the property, and it is necessary that the act of appropriation should be assented to by both parties. But as in the formation of contractual agreements generally, it is immaterial that the parties express their assent at different times, nor is it material which party makes the proposition. The buyer may make it by requesting the seller subsequently to appropriate goods to him, or the seller may make it by appropriating the goods to the buyer and subsequently securing the latter's assent." Williston on Sales, Sec. 274, pages 381-382.

"If, therefore, the goods which he sends are not those ordered, or even if they are too many, or too few, or they are sent at a materially different time, or by a different route or method of shipment, or misdirected, the property will not pass." Williston on Sales, Sec. 278, page 400.

"Appropriation of the goods to the buyer can only be binding upon him if made in accordance with authority previously given by him or fi subsequently assented to by him." Williston on Sales, Sec. 277, page 390.

The rule is laid down in Campbell vs. Mersey, Docks, 14 C. B. (N. S.), 412, headnote, as follows:

"A sale of a given number of bales out of a larger number does not vest the property in the vendee until there has been a specific appropriation by the vendor, assented to by the vendee or his agent."

In Sneathen vs. Grubbs, 88 Pa. St., 147, as elementary a state of facts as exists in this case is shown. Coal was agreed to be sold to be loaded into barges and sent down the river. It was so loaded, but not being delivered as agreed upon was attached

by creditors of the vendor. These attachments were enjoined in a bankruptcy proceeding of the sellers and the purchasers brought [illegible] *thus showing their willingness to take the coal notwithstanding the sellers had not complied with the terms of the agreement of sale.* Held no title had passed to them.

In Hoover vs. Maher, 53 N. W., 646 (Minn.), defendants ordered a lot of twine of the plaintiffs to be shipped at a certain date in the future. The plaintiff's shipped the twine in advance of the date in care of a warehouse to be held there until the date of delivery arrived. The twine was destroyed by fire before the date of delivery. It was held no title passed. The Court said:

> "Merely setting the twine apart from plaintiff's general stock, for the purpose of filling defendant's order, did not pass the title, nor shipping it to the Security Warehouse, nor the receipt of it by the warehouse company, for that company was the agent of the plaintiffs. And had that company either tendered delivery to him at Minneapolis or shipped it to him from that place, prior to the time specified in his order, he would have been under no obligation to receive it. When one orders goods to be sent him, and thereby makes the vendor his agent to select and appropriate the specific article to the contract, the latter must do it in the manner prescribed. Thus when the order was to ship the article from a specific place to the vendee, a shipment from another place was held not an appropriation of the article to the contract, so that the title passed. Jones vs. Schneider, 22 Minn., 279. Of course, the vendee, when authorizing the vendor to make the appropriation, may attach a condi-

tion as to time, as the defendant did in this case, as well as any other condition. The plaintifis did not observe that condition."

In Alsberg vs. Latta, 30 Iowa, 442, the question was whether the title to the goods shipped to one Holden had passed to him so as to be subject to attachment by his creditors. The Court said:

"Whether the verdict is sustained by the evidence or not depends upon the ownership of the property at the time it was attached. If, as contended for by the appellant, the goods were the property of Holden, then there could be no legal recovery by the plaintiff, and the verdict should have been set aside.

"Generally, the delivery of goods purchased to a carrier when they are to be sent by a carrier, is equivalent to a delivery to the purcharer, and the property and risk immediately vest in the purchaser, subject to the vendor's right of stoppage in transit. The effect of a delivery by the consignor to a common carrier is to vest the property in the consignee. Such delivery to the carrier is held to be a constructive delivery to the consignee. 2 Kent's Com., 499. It must be borne in mind, however, that the title thus vests in the consignee by delivery to a common carrier of goods purchased by the consignee. It is not in the power of a consignor to vest the property and risk in another to goods not purchased by such other person. It is only where goods are purchased, and the goods thus purchased are consigned, that the delivery to a carrier, for the consignee, passes the property in the goods to the consignee. Such delivery completes the purchase and sale of the goods, subject, of course, to the right of stoppage in transit.

"Was there a purchase of the goods by Holden so that their delivery to the common carrier vested the title in him?

"In every contract of sale of goods three things are necessary to its validity, viz: The thing sold, which is the object of the contract, the price and the terms, and the consent or assent of the contracting parties, 2 Kent's Com., 468.

"There can be no contract unless the parties thereto assent; and they must assent to the same thing in the same sense. 1 Pars. Cont. (5th Ed.), 475.

"The evidence, as we have seen, shows that the goods sent were not such as were ordered by Holden, and that the terms of payment accompanying the invoice were materially different from those agreed upon between him and plaintiff's agent. Holden did not assent to purchase the goods sent. He never agreed to the terms of payment imposed by the plaintiff. There was, therefore, no sale of the goods by them to him. Had the plaintiffs shipped the goods ordered by Holden, and on terms of payment as agreed to between him and their agent, then a delivery by plaintiffs to the carrier would have been a constructive delivery to Holden, and the title would thereupon have vested in him, but not so when they shipped to him different goods from those he offered to buy, and on terms of payment different from those proposed. And that part of the goods sent corresponded with part of those ordered does not change the result when the the articles which induced Holden to give the order were not sent and especially so when the goods were consigned to him on terms other than those agreed on with the agents of plaintiffs. They could not have maintained an action against Holden for the price of the goods.

"The purchase was never complete. Holden refused to assent to it on plaintiff's terms; they were not the terms he agreed to. He immediately on the arrival of the invoice of the goods, notified the vendors of his refusal to accept; they acquiesced, and offered to sell on other terms, which he declined, whereupon they proposed to sell to other parties, and finally ordered the goods shipped to them.

"Holden never had any property in the goods, nor were they, at any time, in his constructive much less actual possession."

**Lack of Insurance.**

The cotton actually shipped was uninsured; the spinners' agreement was to pay drafts against insured cotton; the certificates of insurance received by the spinners were of the imaginary cotton; so there was no insurance of the actual cotton. If those 1,311 bales had burned in transit, would the loss have fallen on the spinners because the title and hence the risk were in them?

McDonald vs. Pearre Bros., 62 S. E., 830 (Ga.). Action for the price of goods sold and lost at sea. Held that failure of the seller to insure as agreed precluded recovery. The Court said:

"The remaining question in the case is whether the plaintiff's failure to effect insurance on the goods as instructed throws the loss on them. In order to convert the carrier into the agent of the consignee, the goods must be delivered to the carrier in the manner specified by the consignee. 1 Mecham on Sales, 746, et seq., Burdick on Sales (2 Ed.), Sec. 275. If there is a material variation as to route, time, place or manner of delivery to the carrier, the

consignee is not bound thereby and the carrier is the agent of the consignor. Graves vs. Legg, 9 Exc., 709. Wheelhouse vs. Parr, 141 Mass., 593; Corning vs. Colt, 5 Wend, 253; Jones vs. Schneider, 22 Minn., 279; Woodruff vs. Noyes, 15 Conn., 335; Erwin vs. Harris, 87 Ga., 333. When, therefore, the purchaser orders the goods shipped insured and they are delivered to the carrier uninsured and are lost in transit, the loss must be borne by the seller unless he can recover from the carrier. New York Tartar Co. vs. French, 154 Pa. St., 273; Burdick on Sales, (2 Ed.), Sec. 280; Mecham on Sales, Sec. 749."

Other cases to the same effect are cited under proposition VII. at page 28 of this brief.

Whether it is the lack of insurance on the cotton shipped or the failure to ship it in the time agreed upon or failure to send the spinners bills of lading for it, the principle of law standing in the way of the passage of title to the cotton is the same. Title in this aspect of the case is purely a matter of contract. It passes when and as it is agreed it shall pass.

Where unascertained goods are sold to be delivered to the vendee by delivery to a carrier the seller's charter for causing the title to pass by such delivery is found in the agreement of sale and it is only when he complies with the directions, express and implied, of this charter that he divests himself of title and vests it in the buyer—presuming, of course, there is no assent of the buyer to variations from its directions.

"But in order that the delivery of the goods to the carrier shall operate to pass the title

to the consignee, it is essential that the goods so delivered shall conform in quantity and quality with the order given for them, and be sent at the time and in the manner agreed upon. If, therefore, the vendor sends more or less than the quantity ordered or of a different quality, or at a different time, or in a different manner, or otherwise materially vary from the order, the title will not pass unless the purchaser accepts them." Mechem on Sales, Sec. 746.

So that, to take one of the shipments in question, when on April 11th, 1910, the bankrupts delivered to the Southern Railway 100 bales of cotton marked TSAG and took a bill of lading for it to their order, which they retained, and took out no insurance on these bales, the Southern Railway did not become the agent of the Cotonificio Cantoni as it would have become had the cotton been shipped on the preceding January 20th and the bill of lading for it, duly endorsed had been attached to the draft which the bankrupts drew on that day on the bankers of that concern. On the contrary the Railway was the agent of the bankrupt.

"What is sold is not 300 tons of rice in gross or in general. It is 300 tons of Madras rice to be put on board at Madras during the particular months." Quoted in Norrington vs. Wright, 115 U. S., at page 209.

The willingness of the spinners to accept these goods on discovering them after bankruptcy could not affect the title. In that respect the case is controlled by the decision in the Frances, 8 Cranch, 359.

In this case, goods were shipped by an English

subject which were captured during the war of 1812 and the question was whether they had become the property of an American citizen for whom they were intended. It was not shown that the American citizen had any knowledge that the shipment had been made. The head note correctly sets forth the ruling in the case. It is as follows:

> "An intention clearly proved, of a consignor of goods to vest the right of property in the consignee, is not sufficient to effect such a change of property until the goods are received by the consignee or some evidence is given of his agreement to take them on his own account; until that time, the goods are at the risk of the shippers; and if they are enemies, the goods, if captured, are good prize. No difference though the consignee were the agent of a third person who had directed him to order the goods unless it appears that he actually did order them."

The following from the opinion enunciates a fundamental principle that must underlie the decision of this case:

> "But to produce a change of property from the shipper to the consignee it was essentially necessary that the goods should have been sent in consequence of some contract between the parties, by which the one agreed to sell and the other to buy. Had the language of these letters been more explicit than it is to prove that the intention of the consignor was to vest the right of property in the consignee it would not have been sufficient to effect a change, until the goods were received, or some evidence given of the agreement of the consignee to take them on his own account."

To the same effect is the Frances Fed. Cases, No. 5036.

Hence, the evidence being without conflict the Circuit Court and the Circuit Court of Appeals could not properly find or hold, as they did, that the bankrupts had appropirated the cotton to the contracts of sale, and that thereby the title to the cotton had passed to the spinners.

The Circuit Court of Appeals quoting the finding of the Court below (to support which there was no evidence whatever) said: "We are clearly of the opinion that under the facts of the case the delivery of the cotton to the carrier vested the ownership in the spinners, upon the theory that it was the intention of the bankrupts to appropriate it to the contracts."

As we have demonstrated, the intention of the bankrupts, whatever it was, standing alone was immaterial and was not effectual to vest the title in the spinners.

**Presumed Assent.**

Appreciating the incongruity of holding that the title to the cotton passed to the spinners without their knowledge and consent, the Circuit Court of Appeals and the Circuit Court held that the assent of the spinners to the acceptance of the cotton would be presumed, the Circuit Court of Appeals saying: "In view of the circumstances of the case the presumption must obtain that the spinners assented to the delivery of the cotton."

There were no "circumstances of the case" bringing it within the conditions under which the law in some cases presumes the acceptance of a

beneficial transfer by the transferee; on the contrary, these circumstances put the case quite outside of the possibility of applying the doctrine of presumed assent. The doctrine referred to has ordinarily been applied by the Courts, within well-defined limits, with reference to gifts, deeds and assignments for the benefit of creditors. An examination of the cases dealing with the subjects in which the doctrine has been applied, and its application refused, discloses that the presumption of the acceptance of a transfer is never presumed unless the following circumstances substantially appear:

1. That the transaction appears at the time the offer is made to be beneficial to the transferee.

2. That the transferrer relinquishes absolutely all control over the thing transferred.

3. That the offer is without conditions and imposes no burdens upon the offeree.

4. That such actual acceptance occurs before litigation involving the question of the transfer and before the rights of third parties have intervened.

Hulick vs. Scovill, 4 Gilman (9 Ill.), 159-176-8;
Re Kansas City Stone Co., Fed. Case No. 7610;
Cravens vs. Rossiter, 116 Mo., 338;
Parmelee vs. Simpson, 5 Wallace, 81-86;
Elmes vs. Southerland, 7 Ala., 262;
Doe vs. Knight, 5 B. and C., 692;
Tatlow vs. Turner, 28 Tex., 759-773;
Devlin on Deeds, Sec. 285;
Younge vs. Guilbaeu, 3 Wallace, 636;
Bell vs. Farmers Bank, 11 Bush, 34;
Giffard vs. Corrigan, 105 N. Y., 223.

Necessarily the so-called offer of this cotton by the bankrupts to the spinners was with the condition that it be accepted as and for the cotton that should have been shipped when the drafts were drawn, and in satisfaction of the obligations of the bankrupts to the spinners. If it were not in satisfaction of those obligations, then there was no consideration for its transfer and its attempted transfer would necessarily be void as to creditors.

In Cravens vs. Rossiter, 116 Mo., 338; 38 Am. St. Rep., 606, where the question was whether the acceptance of a deed by a grantee would be presumed, the Court said:

> "In the next place the evidence shows that the deed was made in satisfaction of the two thousand dollars debt. *Unless made upon a valuable consideration it was fraudulent and void as to other creditors of the grantor.* The payment of that debt by the execution and delivery of that deed required the assent of the grantee. It was for him to say whether he would accept the deed on such terms, and until he in some way gave his assent the deed could not and would not take effect as a transfer of title. Until then there was no delivery. Indeed, the delivery of a deed is the concurrent act of two parties."

In Halsey vs. Fairbanks, Federal Case No. 5964, the Court gave the reasons why the assent of creditors to a general assignment for the benefit of creditors, where no condition is attached to the assignment, will be presumed; but the learned Judge said:

> "I freely admit that when there are con-

ditions in the assignment, as for instance that the creditors shall release their debts, there the same presumption of assent does not arise, because it involves a question of discretion upon which different minds may draw different conclusions."

In Parmelee vs. Simpson, 5 Wallace, 81, a debtor without the knowledge or consent of his creditor executed a deed to such creditor and caused it to be recorded, and after executing this deed mortgaged the land to a third person. The suit was between the holder of this mortgage and the holder of the deed. The holder of the deed set up that he would be presumed to have accepted the deed, but the Court held that he would not be presumed to have accepted the deed in liquidation of his debt; and further held, in response to his contention that his actual acceptance being shown at a subsequent date, it would be held to relate back to the time of the delivery of the deed, that such relation could not have the effect of cutting off intervening rights.

In re: Kansas City Stone, Etc., Co., Federal Case No. 7610; 9 N. B. R., 76, a deed of trust had been given by a corporation, subsequently becoming bankrupt, more than four months prior to bankruptcy, but its execution had been unauthorized, though it was subsequently ratified within four months of the bankruptcy. It was contended that the deed of trust was not open to attack as a preference in that it was given within four months of bankruptcy, because the ratification of its execution would relate back to the time it was signed, but the Court held that the doctrine of such relation is a fiction and

will not be presumed to effect a wrong and cannot be extended to the prejudice of strangers to the transaction, and says: "*The strangers and third parties in the present case are the other creditors of the bankrupt. Of these the assignee is the trustee, and for their benefit the ratification will not be permitted to relate so as to bind him.*"

In Delvin on Deeds, Sec. 293-a, it is stated; "Where a deed is executed in payment of a debt, the assent of the grantee is necessary to its effect, and no title passes until such assent is given."

Nor can it be said that the assumed transfer was beneficial to the spinners, because:

(a) It imposed the burden of receiving the cotton at a time when the market may have been radically different from what it was when the cotton should have been delivered under the contracts.

(b) It imposed the burden of the spinners paying the insurance which, by the terms of the contracts, was to be paid as a condition precedent by the bankrupts.

(c) It imposed the risk of loss in case of fire or other destructive elements before the insurance could become effective, and it could not have become effective until the spinners were notified and had an opportunity to insure.

(d) It imposed upon the spinners the necessity of foregoing the use of the Liverpool conference bills of lading, which were provided for by the contracts and which were retained by Knight, Yancey & Company, and which were never offered nor tendered by them to the spinners. The deprivation of the bills of lading deprived the spinners of a means of credit, and also threw upon them the burden of

litigation with the carrier if the carrier refused to deliver the property without the production of such bills, as the carrier might readily and legally have done.

The sole authority cited by the Circuit Court of Appeals for its holding that the presumption of acceptance would be applied in this case, is Grove vs. Brien, 8 Howard, 429. Two distinct considerations make that case inapplicable. In the first place, in that case the goods were not transferred directly to the person who was presumed to accept them but were transferred to a third person for his benefit *and reached the hands of this third person before the attachment under which Grove claimed the goods was levied on them.* In the next place, the goods were not sent in payment of a debt but were consigned to a factor to be sold and the proceeds applied on the debt, so they were merely sent and received as security, and if there was any occasion under the facts of the case to presume an acceptance their acceptance could be presumed, since no condition was attached and this acceptance was necessarily beneficial. While the presumption of assent of the beneficiary to a necessarily benefical assignment to a third person may be presumed such presumption is not indulged where the assignment is directly to the beneficiary. Nicoll vs. Mumford, 4 Johns Chan., p. 529.

To hold in the present case that the spinners will be presumed to assent to the offer of the cotton by the bankrupts to them would open the door by the simplest of devices to overturning the primary purpose of the act, presuming that such primary purpose is an equal distribution of the assets of

insolvent debtors among their creditors. Such a holding would enable a debtor in failing circumstances secretly to designate particular parcels of his goods or items of his property as being tendered to his creditors in payment of or on account of their debts. He could execute deeds of real estate to some, and might go further and deliver them without the knowledge of the beneficiaries to registrars to be recorded. He could execute bills of sale to others for portions of his tangible personal property. He could endorse notes and other choses in action, *and after bankruptcy, if the contention of the spinners is sound, it would be presumed that all of these beneficiaries accepted the provisions made for them.* They could say, as the spinners say: We have received no more than we are entitled to—our debts were just debts.

**Actual Acceptance and Waiver after Bankruptcy.**

The spinners contend and the Circuit Court of Appeals held that since, after the cotton was seized the spinners caused the steamship to give bond for it and intervened in this case as claimants, therefore they waived the default of the bankrupts (and presuming always that the cotton could be deemed tendered them) accepted the cotton, so that title then vested in them.

But bankruptcy had intervened, The effect of bankruptcy, as holding intact the then condition of the title of the bankrupts' property has recently been forcibly declared by this Court in the Acme Harvester Co. vs. Beekman Lumber Co., 222 U. S., 300, the Court saying:

"It is the purpose of the bankruptcy law, passed in pursuance of the power of Congress, to establish a uniform system of bankruptcy throughout the United States to place the property of the bankrupt, under the control of the Court, wherever it is found, with a view to its equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in *rem* that the estate is regarded as in *custodia legis* from the filing of the petition. It is true that under Section 70a of the act of 1898 the trustee of the estate, on his appointment and qualification, is vested by operation of law with the title of the bankrupt as of the date he was adjudicated a bankrupt; but there are many provisions of the law which show its purpose to hold the property of the bankrupt intact from the time of the filing of the petition, in order that it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings."

In Belding Hall Mfg. Co. vs. Mercer & Ferdon Lumber Co., 175 Fed., 338, the Court of Appeals for the Sixth Circuit, Lurton, Judge, being the organ of the Court, was called upon to deal with a case very similar to the one under discussion. and there it was held:

"It must be conceded that although the sale included the entire cut of this particular sort of lumber for the season of 1907, and although there had been a payment made on account of the contract of a sum largely in excess of the lumber which had been shipped

and nearly equal to the price of the entire cut up to August 31, 1907, the title to the lumber cut to fill this order had not passed prior to August 31st, because the contract provided for delivery free on board cars at Bogardus, the railway station nearest the mill. If before that had been done bankruptcy had ensued the title would have passed to the bankrupt's trustee, and the buyers remitted to their rights as creditors by reason of this advance payment. So if the lumber had been seized under execution, the execution creditor would have at law the better claim. So, also, if the lumber had been destroyed by fire or flood, the loss would have fallen upon the vendor.

"It follows, therefore, that unless there was a change in the contract on August 31st by reason of the occurrences of that day, the plaintiff in the writ of replevin should have failed in his suit, because unable to show title and right of possession."

To the same effect is;

Low vs. Pew, 108 Mass., 347; 11 Am. Rep., 357.

**Estoppel.**

We have undertaken thus far to demonstrate that the title to the cotton did not pass to the spinners by the claimed appropriation of it by the bankrupts to the contracts of sale. The second contention of the spinners is that the title passed to them by estoppel. They say that the bankrupts were estopped to deny that the forged bills of lading were genuine bills of lading, and that this cotton was shipped under them, and that since the Trustee stands

in the bankrupt's shoes, the Trustee cannot assert title to the cotton. We shall discuss the Trustee's status later.

Let it be conceded that the bankrupts would not have been heard to deny that the forgeries were genuine. Is the spinners' position thereby helped? At the time the bankrupts issued these forgeries this cotton was not in existence. The case is not a case of the sale of specific chattels. The bankrupts had contracted to select and ship certain quantities of cotton. By the forgeries they represented that they had done so. They had not. Suppose the spinners had discovered the fraud before these shipments were made and before the bankrupts acquired this cotton. To do what could they say say the bankrupts, or a trustee of theirs at that time was estopped? Merely to deny that the bankrupts had gotten the money of the spinners and were under the duty of returning it; their civil rights at that time were no higher or better than those of any one else to whom the bankrupts were indebted or were under contract. It would be right, just and fair, of course, for every creditor of the bankrupts to have his money or his goods, but if there were not money and goods enough to go around, why would the bankrupts or their Trustees be estopped from denying that any particular lot of goods or money on hand at the time of bankruptcy did not belong to any particular creditor, if the title to the goods or money had not passed in some other way to such creditor?

Of course, if the title had passed in some other way, there is no occasion to invoke the doctrine relating to estoppel.

The pertinency of the law of estoppel as we understand the spinners' contention is in that it raises title in the spinners independently of any other method.

The law of title by estoppel is applicable in cases where specific property has been sold to which the seller had no title at the time of sale but to which specific property he subsequently acquires title. The seller, says the law, is estopped from setting up this subsequently acquired title as against the vendee, or as sometimes expressed, this subsequently acquired title inures to the benefit of the vendee. But what does it mean to say that where one has sold unascertained goods and has not got any goods at all, that he is estopped? Estopped to do what? Acquire goods of the kind contracted to be sold except under penalty that title shall pass? But who is to say, where unascertained goods have been sold and goods of the kind sold are afterwards acquired, that the title to which of such subsequently acquired goods passes? Is not selection by somebody necessary? If there be such selection amounting to appropriation, title passes without more and it is unnecessary to invoke any estoppel; if there is no such selection and appropriation there is nothing ascertained for the estoppel to operate as to. That there cannot be any such passage of title in the case of unascertained goods was settled in Bryans vs. Nix, 4 M. & W., 794. In this case, the Court said:

> "It is proper, however, to notice the very ingenious argument used on the part of the plaintiffs, founded on the doctrine of estoppel as applied to real estate. If a man by indenture, demise a certain manor which he has not, and

then purchase the manor, and afterwards sells or demises to B., the first lease operates against the purchaser or second lessee and by analogy to this case it is contended that the first bill of lading was good for the plaintiffs by estoppel against the master and consignor, and against the defendant, who claims that cargo which was put on board under the consignor. But this analogy does not hold. In the case of real property the lease is a conclusive admission by the lessor that he has title to the specific estate demised which binds a subsequent purchaser of that estate; here the bill of lading is a conclusive admission only that some oats, amounting to the specified quantity, were on board. In the former case the estate is identified and ascertained at the time of the admission; in the latter, no property existed to which the admission applied, for no oats were on board. In the former case the estate is identified and ascertained at the time of the admission; in the latter, no property existed to which the admission applied, for no oats were on board; and they are not otherwise ascertained than by that statement that they were on board; *and the person who afterwards purchases any oats from the consignor might as well be said to purchase those to which the estoppel relates as he who purchases those which were afterwards put on board.*"

Block vs. Shaw, 95 S. W., 806, is an important case. Shaw contracted with George Taylor Commission Company to buy cotton for him. The Commission Company bought some of it and pledged the warehouse receipts for it to a bank. The Commission Company failed, and after the bank's debt was satisfied out of the proceeds of a sale of the cotton, and a balance was left, Shaw claimed

this balance as against the other creditors of the Commission Company. The Court thus stated Shaw's contention:

> "They say that, as this particular cotton was bought by the agent of the Commission Company specially for the purpose of carrying out the contract with Shaw, the case falls within the equity rule that a contract for the sale of chattels to be afterwards acquired transfers the beneficial interest in such chattels to the vendee so soon as they are acquired by the vendor."

Continuing the Court said:

"Now, in this case, the plaintiff shows that he had a contract with the George Taylor Commission Company to sell him a certain number of bales of cotton of a particular grade and staple at a price named, but no particular cotton was sold or agreed to be sold. The fact that the Commission Company or its agent afterwards bought certain cotton of the kind described in the contract, and bought it furthermore with the intention to afterwards deliver it to the plaintiff in performance of their contract, is a matter of no moment for it was never delivered. If the evidence showed that this cotton was kept by the Commission Company separate from the other cotton owned by it, this still was not a delivery to Shaw, and the title to this cotton, both legal and equitable, remained in the Company up to the time of its failure. The Company could at any time before its failure have changed its mind, and could have disposed of this cotton in any way it saw fit. It could have delivered other cotton of the same kind to plaintiff in fulfilment of

its contract, and he would have had no ground of complaint, for the company, as before stated, never agreed to deliver any particular cotton, but only cotton of a certain grade and staple. It cannot be said that this cotton is the identical cotton sold to Shaw, or agreed to be sold to him, for, as before stated, his contract calls for no particular cotton, and the facts do not bring this case within the equitable rule referred to."

It was said in Stanford vs. McGill, 72 N. W., 938:

"The selection by the vendor of the property he intends ultimately to deliver under a contract is not irrevocable, where he has the choice, and the vendee does not unite with him in such selection. Despite the fact that the vendor has set apart the property as the particular property he will finally deliver, he may change his mind before the time of delivery arrives, and substitute other property in place of that which he had tentatively selected. The vendee acquires by such an ex parte selection no vested right to insist that that is the particular property which must be delivered to him by the vendor to fulfill the conditions of the contract."

With reference to the cotton itself the bankrupts made no representation to the spinners. It is therefore too plain for argument that the fact of its shipment can have no bearing on the question of estoppel. Thus: "According to this rule, representations made or acts done subsequent to the change of position by the other party which they do not invite or influence will not operate as an

estoppel." XI. A. & E. Ency., page 439; 16 Cyc., 741.

The question under discussion is ably argued in Williston on Sales, Sections 142-143 and 144.

The authority relied on by the Circuit Court of Appeals is The Idaho, 93 U. S., 575.

When the facts in this case are analyzed, its superficial applicability to the present case disappears.

Forbes obtained from the master of a ship—The Colson—a bill of lading for 139 bales of cotton. He had delivered no cotton to the ship. Eight days afterwards he delivered 140 bales of cotton to the ship and took a bill of lading for one bale. The Court held that the title to this cotton thereafter followed the bill for the 139 bales and for the one bale, and did not follow a bill of lading for the same cotton subsequently issued by the ship "Londona," to which ship Forbes delivered the same cotton, having surreptitiously removed if from the the "Colson". Rowley vs. Bigelow, 12 Pick., 307, and Halliday vs. Hamilton, 11 Wall., 565, are cited in support of the ruling. An examination of the facts of these two cases in connection with the facts above recited makes the holding clear. In all three cases a carrier issued a bill of lading in advance of receipt of the goods; the vessel issuing the bill received the goods before it sailed in the Idaho case and in Rowley vs. Bigelow, and in the Halliday case the steamboat which issued a bill at St. Louis for goods at a landing some miles down the river, received the goods when that landing was reached. In short, in each case the shipper delivered the goods to the vessel which was to carry them and the bill

of lading which the carrier issued for these goods was held therefore to be an operative bill and the goods were "referred" to that bill. At the time of delivery there was no other bill, good or bad, to refer them to.

In the instant case the bankrupts forged bills; a month or more afterwards goods were delivered to a carrier and bills of lading were taken for them. Will the law "refer" these goods to the bills of lading issued for them or to the forgeries?

As limiting the holding that goods delivered to a carrier, for which it had previously issued a bill will be referred to that bill, the Court was asked in Rowley vs. Bigelow, supra, during what time the goods might be delivered so as to make the bill good? The Court answered as follows:

> "It is asked how long after the signature of the bill of lading property may be delivered on board so as to be bound by it and become the subject on which it shall operate. We think at any time whilst the vessel is taking in her cargo for that voyage, as described in the bill of lading and before she sails upon it. Here there was a time when the bill of lading might have been properly signed by the master, namely, after the corn was delivered and before the vessel sailed, and it was admitted this was received as and for the corn mentioned in the bill of lading." (Rowley vs. Bigelow, 12 Pick., 306).

The master and the shipper were therefore estopped to deny in all these cases that where one lading was issued and one lot of goods received that the lading referred to those goods and those goods were referable to that lading.

The decision in the Idaho case is promotive of commercial regularity, because as is well known the issue by carriers of bills of lading in advance of the receipt of the goods with the expectation of their receipt, is not uncommon, but commercial regularity would not be promoted by a decision that goods delivered to a carrier against its bill of lading would not be referred to its bill but would be referred to a forgery issued some time previously.

**The Trustee's Status.**

If, as the Circuit Court of Appeals held, the title to the cotton passed by the acts of the bankrupts, it is wholly immaterial in whose shoes the Trustee stands. That Court speaks of the jealousy with which the Courts guard the rights of innocent purchasers, meaning that the spinners innocently purchased *this cotton*. We disclaim any purpose to assault the rectitude of the spinners or to defend the depravity of the bankrupts. They are not our clients. We speak for the officer whose duty it is to collect the property to which the bankrupts' creditors are entitled under the law to look for some portion of their debts. This property is, so far as the argument in this case need extend, "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him."

Act, Sec. 70-a-5.

We insist that the cotton in question could have both been transferred by the bankrupts and

also could have been levied upon by their creditors. But if it be the law that the bankrupts could not do again what they had actually done, as to some of the cotton, transfer it by transferring those bills, then we urge that the cotton was not immune from the execution of the bankrupts' creditors, because, under the law of Alabama, if the bankrupts succeeded in vesting in the spinners by their acts an interest in this cotton short of the entire title, since the bankrupts retained the *actual* right to dispose of it, their transfer to the spinners of whatever nature it was or out of whatever acts it can be said to arise, was void. They did have this actual right of disposition as much so as if the physical bales had remained in their possession. Concede for the moment that as a result of the act of the bankrupts in putting certain marks on the bales the spinners could have claimed those bales on discovering them, neither that act nor any other visible act of the bankrupts stood in the way of their handing over the physical bales to whomsoever they might desire. (Stewart vs. Nelson, 79 Mo., 524.) The actual control of the physical bales was not changed after they were put on the cars. Concede also that as to the spinners it would have been wrongful for the bankrupts to have made any disposition of those bales, at least without accounting to the spinners, *still they could have done it.*

The argument on this subject with the authorities relied on is breifly stated in paragraphs XVII to XXI of the summary of the argument, ante. We shall here elaborate it by quoting from some of the Alabama authorities.

Benedict vs. Renfro, 75 Ala., 121, deals fully

with the general principles prevailing in Alabama in cases where property is transferred by a debtor—he either expressly or impliedly reserving a right of disposition, in so far as such transfer affects the rights of creditors. A quotation from the case hardly does it justice, though the following gives an idea of its scope:

> "The objection urged in the present case is not to any stipulation, express or implied, for the mortgagor's retention of possession merely, but to an implied reservation of a power of sale in the mortgagor for his own use and benefit, and the argument is, that this feature of the case operates to stamp the transaction with fraud.
>
> "The general principle is well stated by the Supreme Court of the United States, in the case of Robinson vs. Elliott, 22 Wall., 523, where it is said that 'the creditor must take care in making his contract, that it does not contain provisions of no advantage to him, but which benefit the debtor, and were designed to do so, and are injurious to other creditors. The law will not sanction a proceeding of this kind. It will not allow the creditor to make use of his debt for any other purpose than his own indemnity. If he goes beyond this, and puts into the contract stipulations which have the effect to shield the property of his debtor, so that creditors are delayed in the collection of their debts, a court of equity will not lend its aid to enforce the contract.' This principle is as ancient in our jurisprudence as Twyne's case, decided nearly three centuries ago, where the doctrine was settled that the retaining of goods in possession by a vendor, with the power of trading with them as his own, rendered the sale fraudulent and void as against creditors.

> The reason assigned was that 'he continued in possession, and used them as his own, and by reason thereof he traded and trafficed with others, and defrauded and deceived them.' 3 Coke 80; s. c. 1 Smith's Lead. Cases (H. & W.), 33. The controlling principle of the case is, that the possession of property, with the accompanying power of dominion and disposition, is an incident of ownerhsip, the right to which in all honesty and justice, should be denied to any one except the absolute owner. The law, therefore, justly requires that all transfers or assignments of a debtor's property should be made in good faith for the purpose of paying or securing his debts, and 'without any intent to lock up the property from creditors for the use of the debtor.'—Bump on Fr. Conv. (3d Ed.), 399. Our present statute is a strong affirmation of this principle of law, and was designed more effectually, perhaps, to carry into effect the doctrine of Twyne's case. It declares 'all deeds of gift, all conveyances, transfers and assignments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, are void against creditors, existing or subsequent, of such person.'"

The statute of Alabama quoted in the above excerpt is the same statute as that quoted in paragraph XVII of the summary of the argument in this brief.

In McDermot vs. Eborn, 90 Ala., 258, the grantor transferred a stock of merchandise by an instrument which was in form a bill of sale, but the Court found that the grantor was in fact permitted to remain in possession of the goods and to sell them and appropriate the proceeds of sale to his

own use. The Court held that the transfer was void both as to existing and subsequent creditors of the grantor notwithstanding there may have been no actual intention to defraud, basing its holding on the terms of the statute which we have quoted.

To a similar effect are the other cases decided by the Alabama Supreme Court cited under our paragraph XVII, ante.

It has been expressly held in Alabama that goods thus conveyed by a grantor where he reserves the power of actual disposition are subject to levy by his creditors.

Hall vs. Ala. Terminal, etc., Co., 143 Ala., 474-475;
Freeman on Executions, Sec. 136.

The statute is not limited in its terms to judgment creditors; nor is it held to be limited to such creditors; nor is it necessary that the grantor be insolvent.

Authorities cited under paragraph XVIII-A, of summary of the argument.

We appreciate the difficulties involved in the contention that there was in the instant case a transfer to the spinners of any right, title or interest in the cotton which would make the statute of Alabama applicable, but that Scylla to us in making the argument which we now make is the Charybdis of the spinners which makes the argument germane. That there was in fact no transfer we feel that we have demonstrated in preceding portions of this brief, but if there was such transfer

it brings the matter within the influence of the statute to which we refer.

We, therefore, contend that however the status of the cotton might have been as between the bankrupts and the spinners had the bankrupts remained solvent, the Trustee is, by virtue of the statute referred to, in a better position than the bankrupts, and the contention, in view of the holdings of the Supreme Court of Alabama as to the scope and effect of the statute of Alabama, which we have quoted, can be rested if necessary on that provision of the bankruptcy act which vests title in the Trustee to the property transferred by the bankrupts in fraud of his creditors, since, under the decisions referred to, such transfers are in effect fraudulent as to creditors though there be no actual intent to defraud.

The case is thus brought within the scope of the decisions of this Court in Knapp vs. Milwaukee Trust Co., 216 U. S., 545, and Security Warehousing Co. vs. Hand, 206 U. S., 415.

In Knapp vs. Milwaukee Trust Company, supra, the Court said:

> "But it is said the trustee in bankruptcy may not defend against these mortgages. It is contended that they are good as between the parties, and that, as to them, the trustee in bankruptcy occupies no better position than the bankrupt. This question was raised and decided in Security Warehousing Co. vs. Hand, 206 U. S., 415, 51 L. Ed. 1117, 27 Sup. Ct. Rep. 720, 11 A. & E. Ann. Cas., 789. That case arose in Wisconsin, and it was therein held that, under the Wisconsin law, an attempted pledge of property, without change of possession, was void under the laws of that State. In

that case, as in this one, the question was raised as to whether the trustee in bankruptcy could question the transaction, and it was contended that, being valid as between the parties, the trustee took only the right and title of the bankrupt. The question was fully considered therein, and the previous cases in this court were reviewed. The principle was recognized that the trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands is subject to the equities impressed upon it while in the hands of the bankrupt.

"But it was held that the attempt to create a lien upon the property of the bankrupt was void as to general creditors under the laws of Wisconsin. Applying Section 70a of the bankruptcy act, it was held that the trustee in bankruptcy was vested by operation of the bankrupt law with the title of the property transferred by the bankrupt in fraud of creditors, and also that the trustee took the property which, prior to the filing of the petition, might have been levied upon and sold by judicial process against the bankrupt. It was therefore, held that, as there had been no valid pledge of the property, for want of change of possession, it could have been levied upon and sold under judicial process against the bankrupt at the time of the adjudication in bankruptcy, and passed to the trustee in bankruptcy."

In addition to the case of Security Warehousing Co. vs. Hand, supra, the attention of the Court is called to the well considered cases of Fourth Street National Bank vs. Milborne Mills Company, Trustee, 172 Fed., 177, (C. C. A.); and in re: Rogers, 125 Fed., 180 (C. C. A.).

It is therefore respectfully submitted that the cotton in question was not beyond the reach of the

bankrupts' creditors, and that there is, therefore, absolutely nothing in the record from which either the Circuit Court or the Circuit Court of Appeals could have deduced the conclusion that the Trustee was not, under the bond under which the suit was brought, entitled to a judgment for the full value of the cotton.

**The Questions in the Case are Questions of Law.**

In this case there was a waiver of trial by jury, under Section 649 of the Revised Statutes, 4 Federal Statutes Annotated, 393. It was also tried on agreed facts, and is by the terms of Section 700 Revised Statutes, 4 Fed. Stat. Anno., 450, subject to review on writ of error.

The agreed facts in the case were ultimate facts. There was no conflict in the evidence, there was no testimony to be weighed, and nothing to be reconciled. The evidence was open to but one conclusion, and that was a conclusion of law. It was a case in which if it had been tried before a jury it would have been the court's duty to direct a verdict. The plaintiff in error requested the court to find the facts as they were stipulated to be, and on that finding to render judgment for the plaintiff. The failure of the lower court to find the facts as stipulated, and on such finding render judgment for the plaintiff, is made the basis of the seventh assignment of error in this court, and this assignment, without more, perfectly presents to the court the case for its decision. In addition, in the progress of this brief, we have pointed out repeated holdings both of the Circuit Court of Appeals and the Circuit Court essential to their conclusions which there was no

evidence whatever, to support. There being no evidence to support such findings, they do not stand in the way of this court's review of the case. The Circuit Court of Appeals regarded the case proper for its review and decided it on its merits, and in view of this fact we deem it necessary only briefly to call to this court's attention some of the more pertinent decisions on the question under discussion.

We understand furthermore, that in the connection in which this brief is submitted it is not necessary to discuss the assignments of error in detail, the brief being submitted in support of the Supreme Courts jurisdiction.

"As to the finding. Even before the act of 1865, 13 Stat. at L., 501, ch. 86, sec. 4, reproduced in sections 649 and 700, Rev. Stat., it was always held that a judgment on agreed facts spread at large on the record could be reviewed here on a writ of error. Such a statement was considered to be equivalent to a special verdict and to present questions of law alone for the consideration of the Court. It is manifest that the Act of 1865 was not intended to interfere with this practice. The evident object of that legislation was to give special findings the same effect, for the purposes of a writ of error, as a special verdict on an agreed case.

*"The record shows distinctly that the court was only required to determine whether in law on the agreed facts, the defendants were liable on their bond. It is true that in the judgment as entered it is stated that the court found the issue in favor of the plaintiffs, but, that when read in connection with the bill of exceptions, is no more than a declaration that the court*

*found the law to be in favor of the plaintiff on the case as stated.*

"There were in fact no pleadings after the declaration, and the effect of the stipulation that pleas proper to the case were on file, was that the pleadings presented in form the case as stated and left nothing for the court to do but to enter judgment thereon. There was no issue but of law, and that the court found for the plaintiffs. The same case is brought here by the record and we are entirely satisfied it is one we have the power to review."

Board of Supervisors of Wayne County, Ill., vs. Kennicott, 103 U. S., 486; 26 L. Ed. 554.

A legal conclusion, though styled a finding of fact, is not conclusive on review.

Britannia vs. Cleugh, 153 U. S., 130.

In Merchants' Ins. Co. vs. Allen, 122 U. S., 71, the Court said:

> "In the case of The Francis Wright, it was ruled, p, 387, and, as we are satisfied, correctly, 'that if the Circuit Court neglects or refuses, on request, to make a finding one way or the other, on a question of fact material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal, taken in time and properly presented by a bill of exceptions, may be considered here on appeal. So, too, if the Court, against remonstrance, finds a material fact which is not supported by any evidence whatever, and an exception is taken, a bill of exceptions may be used to bring up for re-

view the ruling in that particular. In the one case, a refusal to find would be equivalent to a ruling that the fact was immaterial; and, in the other there was some evidence to prove what is found when in truth there was none.' But, it was added, 'this rule does not apply to mere incidental facts which only amount to evidence bearing on the ultimate facts of the case. Questions depending on the weight of evidence are, under the law as it now stands, to be conclusively settled below; and the fact in respect to which such an exception may be taken must be one of the material and ultimate facts on which the correct determination of the case depends.' "

If there is no evidence to support a contrary finding, a motion for a finding for the party entitled thereto will be reviewed.

Wright vs. Bragg, 96 Fed. Rep., 729;
37 C. C. A., 574.

In United States vs. Clark, 96 U. S., 37, the Court said, in a claim case, that, where all the evidence was before it on which a finding was made, the finding was based on incompetent evidence which should be reviewed. This holding is approved in Collier vs. U. S., 173 U. S., 79.

The practice of submitting a case on agreed facts is well recognized in the practice of the courts of this country. (In this case a judgment for defendant was reversed and judgment entered by the appellate court for plaintiff.)

U. S. vs. Elaison, 16 Peters, 91;
Approved in Stimpson vs. B. & S. R. R., 01 Howard, 329.

No finding of fact is necessary where the case is submitted upon agreed facts.

Saltonstall vs. Russell, 158 U. S., 628.

The holding of the last cited case is approved in Rathborne vs. Board of Commissioners, 83 Fed. Rep., 132, where, on reversal, the court entered a judgment for the plaintiff.

Respectfully submitted,

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Plaintiff in Error.

DEC 18 1912
JAMES H. McKENNEY,

# Supreme Court of the United States,

OCTOBER TERM, 1912,

No. 593.

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WILLIAM S. LOVELL, Trustee in Bankruptcy of Knight, Yancey & Co.,

*Petitioner for Certiorari,*

*against*

ISIDORE NEWMAN & SON, *et al.*,

*Respondents.*

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## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

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# INDEX.


PAGE.

STATEMENT OF FACTS..... 3
EFFECT OF FINDINGS OF FACT..... 9

POINTS.

I. THE TRUSTEE STANDS PRECISELY IN THE SHOES OF KNIGHT, YANCEY & CO. AND HAS NO BETTER TITLE NOR GREATER RIGHTS THAN KNIGHT, YANCEY & CO. HAD PRIOR TO THE ADJUDICATION..... 12

II. THE SHIPMENT BY KNIGHT, YANCEY & CO. WAS AN APPROPRIATION OF THE COTTON TO THE CONTRACTS OF PURCHASE AND TO THE FIRST SET OF BILLS OF LADING, AND TITLE PASSED IMMEDIATELY UPON THE SHIPMENT TO THE SPINNERS..... 26

*1. Where goods are sold to be shipped by carrier, title ordinarily passes upon such shipment, especially where the price has been paid*..... 26

*2. Shipment C. I. F.*..... 27

*3. Legal relations arising in the course of an honest transaction*..... 30

*4. The actual transaction*..... 31

III. ESTOPPEL..... 37

IV. THE PETITIONER'S ARGUMENT..... 48

*1. Retention of the Genuine Bills of Lading*..... 48

PAGE.

*2. Delay in Shipment—Insurance*..... 53
*3. The Petitioner's Authorities*..... 63

V. PREFERENCE..... 69

VI. ITALIAN AND FRENCH DECISIONS..... 73

VII. CONCLUSION..... 74

## Table of Cases.


| | PAGE. |
|---|---|
| Aldine Trust Co. *v.* Smith, 182 Fed. 449 | 15, 43 |
| Alexander *v.* Machan, 147 U. S. 71 | 11 |
| Allen *v.* Whittemore, 8 Ben. 485 | 15 |
| Alsberg *v.* Latta, 30 Ia. 442 | 64, 67 |
| Andrews *v.* Schreiber, 93 Fed. 367; S. C. 101 Fed. 763 | 59 |
| Arkwright Mills *v.* Aultman Co., 145 Fed. 783 | 57 |
| Ashmore *v.* Cox, L. R. (1899) 1 Q. B. 436 | 64 |
| Austin *v.* Buckman, 95 N. W. 128 | 47 |
| Bacon *v.* Cobb, 45 Ill. 47 | 58 |
| Belding Hall Mfg. Co. *v.* Mercer Co., 175 Fed. 335 | 66 |
| Benedict *v.* Renfroe, 75 Ala. 121 | 24 |
| Block *v.* Shaw, 95 S. W. 806 | 66 |
| Bloomingdale *v.* Empire Rubber Co., 114 Fed. 1016 | 72 |
| Bowden Bros. *v.* Little, 4 Comm. 1364 | 29 |
| Bradford *v.* Marbury, 12 Ala. 520 | 49 |
| Browne *v.* Hare, 4 Hurls. & N. 822 | 50 |
| Bryans *v.* Nix, 8 M. & W. 794 | 68, 69 |
| Bryant *v.* Swofford Bros. 214 U. S. 279 | 20 |
| Bush *v.* Marshall, 6 How. 284 | 38 |
| Bush *v.* Person, 18 How. 82 | 38 |
| Carlos F. Roses, 177 U. S. 655 | 48 |
| Chace *v.* Chapin, 130 Mass. 128 | 43 |
| Coder *v.* Arts, 213 U. S. 223 | 20 |
| Conard *v.* Atlantic Ins. Co. 1 Pet. 386 | 45 |
| Crawford *v.* Kicksey, 55 Ala. 282 | 24 |
| Day *v.* Pool, 52 N. Y. 416 | 57 |
| Delaurier *v.* Wyllie, 17 Ct. Sess. Cas. 4th Series 167 | 30 |
| Doe *v.* Bancks, 4 B. & A. 404 | 55 |

PAGE.

Donaldson *v.* Farwell, 93 U. S. 631..... 14, 60
Dooley *v.* Pease, 180 U. S. 126; S. C. 88 Fed. 446..... 10, 46
Dows *v.* Nat. Exch. Bank, 91 U. S. 618.. 49, 66, 67
Dugan *v.* Nichols, 125 Mass. 34..... 43
Eastern Granite Roofing Co. *v.* Chapman, 190 Ala. 440..... 58
Easton *v.* Wostenholm & Son, 137 Fed. 524. 29
Ellershaw *v.* Magniac, 6 Exc. 570..... 65
Faulkes *v.* Kamp, 3 Fed. 898..... 39
Filley *v.* Pope, 115 U. S. 213..... 64
First Nat. Bank *v.* Smith, 93 Ala. 97..... 24
Foley *v.* Felrath, 98 Ala. 176..... 59
Fourth Nat. Bank *v.* Milbourne Co's Trustee, 172 Fed. 177..... 69
*Frances,* 8 Cranch, 335..... 68
Gabarron *v.* Kreeft, L. R. 10 Exc. 274..... 65
Gallagher *v.* Nichols, 60 N. Y. 438..... 55
Grove *v.* Brien, 8 How. 429..... 61
Gumbel *v.* Pitkin, 124 U. S. 131..... 54
Hall *v.* Richardson, 16 Md. 396..... 50
Hamlyn *v.* Griendtsveen Co., 6 Times L. R. 274..... 30
Harris *v.* Truman, L. R. 9 Q. B. D. 264.... 15
Henderson *v.* McFadden, 112 Fed. 389.... 64
Hentz *v.* The *Idaho,* 93 U. S. 575..... 22, 36, 39, 41, 51, 52
Hewit *v.* Berlin Machine Works, 194 U. S. 296..... 14, 20
Holmes *v.* Winchester, 133 Mass. 140..... 43
Hoover *v.* Mahler, 53 N. W. 646..... 67
Howell *v.* Carden, 99 Ala. 100..... 23
*Idaho*—see Hentz *v.* The *Idaho.*
Ireland *v.* Livingston, L. R. 5 H. L. 395.... 30
Jeffrey Mfg. Co. *v.* Central Coal Co., 93 Fed. 408..... 60

| | PAGE. |
|---|---|
| Jones *v.* Schneider, 22 Minn. 279 | 64 |
| Joyce *v.* Swann, 17 C. B. N. S. 84 | 50 |
| Kelly *v.* Scott, 49 N. Y., 595 | 40 |
| Kimball *v.* Blaisdell, 5 N. H. 533 | 47 |
| Knapp *v.* Milwaukee Trust Co., 216 U. S. 545 | 19, 20, 21, 69 |
| Layson *v.* Cooper, 174 Mo. 210 | 40 |
| Leather Bank *v.* Morgan, 117 U. S. 96 | 46 |
| Levy & Co. *v.* Williams, 79 Ala. 171 | 24 |
| Low *v.* Pew, 108 Mass. 349 | 68 |
| Lyon *v.* Bertram, 20 How. 149 | 58 |
| McBane *v.* Wilson, 8 Fed. 734 | 47 |
| McDonald *v.* Pearre Bros. 62 S. E. 830 | 68 |
| McKay & Aldus, In re, 1 Low. 345 | 15, 42 |
| McKenna, In re, 9 Fed. 27 | 15, 43 |
| Mayer *v.* Clark, 40 Ala. 259 | 24 |
| Mee *v.* McNider, 109 N. Y. 500 | 28 |
| Merchants Mutual Ins. Co. *v.* Allen, 121 U. S. 67 | 11 |
| Merchants Nat. Bank *v.* Bangs, 102 Mass. 291 | 50 |
| *Merrimack*, 8 Cranch, 317 | 68 |
| Mirabita *v.* Imperial Ottoman Bank, L. R. 3 Ex. Div., 164 | 60 |
| Morrison *v.* Caldwell, 17 Am. Dec. 84 | 47 |
| National Bank *v.* Merchants Bank, 91 U. S. 92 | 32 |
| Neill *v.* Whitworth, 18 Com. B. N. S. 435 | 56 |
| Nelson *v.* C. B. & Q. R. R. 2 Ill. App., 180 | 51 |
| Norrington *v.* Wright, 115 U. S. 188 | 64 |
| Norris *v.* Jackson, 9 Wall. 125 | 10 |
| Ogle *v.* Atkinson, 5 Taunt. 759 | 48 |
| Parker *v.* Marks, 82 Ala., 548 | 38 |
| Parker *v.* Schuller, 17 Times L. R. 299 | 30 |
| Parmelee *v.* Simpson, 5 Wall. 81 | 65 |
| Pease Car Works, In re, 134 Fed. 919 | 43 |

PAGE

Redlands Orange Growers *v.* Gorman, 76 Mo. App. 184; S. C. 160 Mo., 203..... 56
Richardson *v.* Shaw, 209 U. S. 365..... 20
Risley *v.* Smith, 64 N. Y. 576..... 55
Rowe *v.* Page, 54 N. H. 190..... 43
St. Jose Indiano, 1 Wheat. 208..... 64
Seaman *v.* Nolen, 68 Ala. 463..... 24
Security Warehousing Co. *v.* Hand, 206 U. S., 415 .....19, 20, 21, 69
Sherman *v.* Cham. Tr. Co., 31 Vt. 162..... 38
Smith *v.* Peyrot, 201 N. Y. 210..... 56
Sneathen *v.* Grubbs, 88 Pa. 147..... 65
Soper *v.* Creighton, 93 Me. 564..... 64
South Chicago Elevator Co. *v.* United Grain Co., 165 Fed. 132..... 11
Stanford *v.* McGill, 72 N. W. 938..... 66
Stroms Bruks, Etc. *v.* Hutchison, 1905 App. Cas. 515 ..... 30
Taylor *v.* Agric. Ass., 68 Ala. 228..... 47
Tefft *v.* Munson, 57 N. Y., 97..... 47
Thompson *v.* Fairbanks, 196 U. S. 516..... 20
Tregelles *v.* Sewell, 7 Hurls. & N. 574.... 29
Turner *v.* Liverpool Dock Trustees, 6 Exc. 543 ..... 64
Tyng *v.* Grinnell, 92 U. S. 467..... 10
Ullman *v.* Myrick, 93 Ala. 532..... 24
United States *v.* Andrews, 207 U. S. 240.. 27
U. S. F. & G. Co. *v.* Board of Com'rs, 145 Fed. 144..... 46
*Venus*, 8 Cranch. 253..... 68
Wait *v.* Baker, 2 Exc. 1..... 65
White *v.* Patten, 24 Pick. 324..... 38
Yeatman *v.* N. O. Savings Inst., 95 U. S. 764 ..... 14
York Mfg. Co. *v.* Cassell, 201 U. S. 344.... .....14, 17, 18, 19, 20, 21
Zartman *v.* First Nat. Bank, 216 U. S. 134.. 13, 72

# Supreme Court of the United States.

WILLIAM S. LOVELL, Trustee in Bankruptcy of Knight, Yancey & Co.,
Petitioner for Certiorari,

*against*

ISIDORE NEWMAN & SON, *et al.*,
Respondents.

October Term, 1912.
No. 593.

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

This is a petition for certiorari to review a judgment of the Circuit Court of Appeals for the Fifth Circuit. The action was brought by Lovell, as Trustee in bankruptcy, in the Circuit Court for the Eastern District of Louisiana, upon a bond (Record, pp. 149-150) executed by one Ruhne, master of the steamship *Ingelfingen*, and by the defendants Newman, *et al.*, conditioned to pay to the plaintiff the value of 1311 bales of cotton then on board the steamship *Ingelfingen*, and about to be transported to Europe, if the plaintiff should establish title thereto in himself. Certain Italian cotton spinners intervened in the proceedings by petition, alleging that they were the true owners of the cotton, that the bond in

suit was given on their account and at their expense, and that they were the real parties in interest (Record, p. 30). The case was tried in the Court below upon an agreed statement of facts, a jury having been waived by stipulation (Record, pp. 45, 152, 153).

The Circuit Court duly made its findings of fact (Record, p. 175), handed down a written opinion (Record, p. 37), and rendered judgment in favor of the defendants and intervenors (Record, pp. 41, 42). The plaintiff below thereupon prosecuted a writ of error to the Circuit Court of Appeals which rendered an opinion (Record, p. 202) and affirmed the judgment (p. 212). Thereupon the plaintiff sued out a writ of error from this Court; but, having doubt as to this Court's jurisdiction on writ of error, also makes the present application for certiorari.

It should be stated that counsel for the respondents are about to move for a dismissal of the writ of error or for an affirmance under Rule 6. The motion would have been submitted simultaneously with the present application but for the fact that counsel for petitioner served notice of the present application just two weeks prior to the date of submission; and it was then impossible to give the three weeks notice required for the motion to dismiss. That motion will therefore be submitted on January 13th.

These facts are called to the Court's attention so that, if it be thought advisable, consideration of this application may await the submission of the motion to dismiss, and both be disposed of at once.

## Statement of Facts.

Various facts which seem to the respondents important, are not contained in the statement of facts in the petition. It is therefore deemed necessary to restate the facts briefly.

The cotton was shipped by Knight, Yancey & Company to certain Italian cotton spinners (the intervenors) in fulfillment of contracts of sale made between the spinners and Knight, Yancey & Company. At the time of the bankruptcy, the cotton was *en route* to the spinners under through bills of lading, and was stopped by a restraining order of the District Court, issued on application of Knight, Yancey & Company's receivers, while the cotton was on board the *Ingelfingen* and in the possession of Ruhne, as master of that vessel. The bond in suit was furnished on behalf of the spinners to release the cotton, which was thereupon transported to its destination and delivered to the spinners in Italy.

At the time the restraining order was issued, the cotton was admittedly in the lawful possession of the ocean carrier in pursuance of the shipment made by Knight, Yancey & Co. It was not "in process of shipment" as stated at p. 4 of the petition for certiorari. On the contrary it had been shipped at various dates from ten days to five weeks prior to bankruptcy.

To succeed, the petitioner is obliged to establish his title to the cotton at the time the bond was given, and also his right to take possession as against the carrier and the spinners.

It appears from the agreed statement of facts that certain contracts (Exhibits 1-8 inclusive, Record, pp. 71-86), had been made between Knight, Yancey & Company, who were large dealers in and

exporters of cotton, and various Italian spinners. These contracts were dated in December, 1909, and January, 1910. They called for the shipment by Knight, Yancey & Company of specified quantities of cotton of specified grades, under through bills of lading to Genoa, via the Cotoniera Steamship Line. The spinners were to pay for the cotton at fixed prices by means of drafts to be drawn by Knight, Yancey & Co. on certain bankers designated in the contracts, at 90 or 180 days' sight. The cotton was to be shipped during January and February, 1910.

At the time fixed in the contracts, Knight, Yancey & Company drew on the designated bankers drafts for the contract purchase price of the cotton (Exhibits 22-34 inclusive; Record, pp. 104-113). They attached to each of these drafts an invoice (Exhibits 47-58; Record, pp. 117-128). Each invoice referred by date to the contract under which the sale was made, bore the name of the purchasing spinner, and stated the purchase price, computed as provided in the contract. Knight, Yancey & Company then attached to each draft and invoice what purported to be a bill of lading of the Southern Railway Company, drawn in accordance with the terms of the contract, and consigning the cotton which it purported to cover through to Genoa (Exhibits 9-21 inclusive; Record, pp. 87 *et seq.*). These bills of lading ran to the order of the shipper, and contained a direction to notify Gino Gavirati, the Italian cotton broker through whom the contracts of sale had been concluded. A certificate of insurance was also attached to each set of documents, and under its terms the loss, if any, was payable to the indorsee of the certificate. The certificates are Exhibits

35 to 46 inclusive (Record, pp. 114, 116). The bill of lading, the draft, the invoice and the certificate each contained certain identifying marks—a combination of four letters with which they represented that the cotton was marked.

No cotton was in fact shipped at the time when Knight, Yancey & Company issued these documents, and the signature of the railroad agents on the bills of lading had been forged by Knight, Yancey & Co.

The drafts were thereupon sold by Knight, Yancey & Company at their face value, less discount, and the drafts, bills of lading and insurance certificates were indorsed in blank by Knight, Yancey & Company, and, still fastened together, were delivered to the discounting bank. The documents were thereupon sent forward through the correspondents of the discounting bank to the bankers on whom the drafts were drawn. These bankers, who were duly authorized by the spinners, and who, like the spinners, honestly believed that the documents represented cotton actually shipped, accepted the drafts, and thereupon the bills of lading were delivered to the spinners. The drafts were duly paid by the banks, who were reimbursed by the respective spinners (Statement of Facts, paragraphs 5, 6 and 7; Record, pp. 47, 48).

It will be observed that this transaction was perfectly regular, and in accordance with the customary method of doing business, except in the single particular that the bills of lading were forgeries, which fact was not known to the accepting banks or to the spinners. The result was that Knight, Yancey & Company, therefore, received payment under the contracts without having shipped the cotton.

Thereafter, Knight, Yancey & Company at various dates between March 16, 1910, and April 11, 1910, actually shipped the cotton called for by the contracts. The cotton so shipped bore the same identifying marks as those on the forged bills, invoices, drafts and insurance certificates. It was of precisely the grades and quantities called for by the contracts. As more fully pointed out below (pp. 33-35), the forged bills had been prepared with such foresight that the genuine bills, when issued, were precise duplicates of the forged bills in practically everything except date.

In the case of the Decatur shipments, Knight, Yancey & Co. concealed the genuine bills of lading unindorsed for some six weeks. The receivers in bankruptcy were appointed on April 21, 1910 (Record, p. 51). They instituted the District Court proceedings to stop the cotton on May 3, 1910 (Record, p. 132). Up to this time, as appears by their petition in the District Court, which is part of the record in this case, the receivers had not been able to obtain these genuine bills of lading from Knight, Yancey & Company, or even to find out whether they existed. Their petition, which is attached to the statement of facts as a part thereof, alleges (Record, p. 130):

"The original bills of lading for said cotton have been either destroyed or made away with and are not now outstanding or in the bona fide possession of any third persons."

As appears by the statement of facts, (Paragraph 9, Record pp. 48, 49) it was not until after the appointment of the petitioner as trustee in bankruptcy, which occurred on May 26, 1910, that these bills of lading were obtained. They were

*then* indorsed in blank by Knight, Yancey & Company and given to the trustee.

A slightly different procedure was followed with respect to the bills of lading for the Selma shipments. The main office of Knight, Yancey & Company was at Decatur, Alabama; another office at Selma. The Selma office reimbursed itself from the Decatur office for its expenditures on the portion of the cotton shipped from Selma by sending the Selma bills of lading to the Decatur office through the local banks, attached to drafts on the Decatur office. These drafts were at once paid by the Decatur office, which thus obtained the Selma bills of lading, free and clear of any claim on the part of the banks. This was on April 16, 1910, several days prior to the bankruptcy. (Statement of facts par. 9; Record pp. 48, 49). From that time on, they were dealt with in the same way as the bills for the cotton shipped at Decatur. Knight, Yancey & Company kept possession of them, concealed them from the receivers, so that the latter concluded that they had been destroyed or made away with; and it was not until some time after May 26th that the petitioner was able to secure them.

In other words, Knight, Yancey & Company suppressed the genuine bills of lading. They did not use them to raise money; they did not sell or endeavor to sell them to any one; they simply kept possession of them, and concealed them, with the obvious intention that the spinners should get the cotton on the forged bills and that the fraud should thus be covered up.

The Circuit Court found (Record, p. 176):

"6. That by marking and shipping the said cotton, as above set out, Knight, Yancey & Company

intended to appropriate and did appropriate it to the fulfillment of the said eight contracts of sale, and that by delivering it to the carrier they perfected delivery to the buyers under the terms of the said contracts.

"7. That Knight, Yancey & Company retained the genuine bills of lading for the said cotton in their own possession, and that it was their intention to suppress them and to allow the buyers to claim the cotton on the forged bills of lading attached to the drafts above mentioned."

The Court further found (Record, p. 177), that the bankrupts and their trustee were estopped to claim any title to the cotton and that in fact they had no title.

The petitioner's position seems to be that the bankrupts and himself, as their successor, are entitled to keep the money and get the cotton both; or, to put it more exactly, that, having been once paid for the cotton in accordance with the contracts, the trustee is entitled to profit by the fraud of the bankrupts, which, for the purposes of this case, is his own fraud, and to secure by this suit a second payment for the same cotton. The Circuit Court of Appeals, referring to this contention, well says (Record, p. 208):

"They had once been paid full value and it would be shocking to the sense of justice to suppose that they could have enforced a second payment."

The position of the respondents may be stated briefly as follows:

1. The trustee took the estate subject to all titles, estoppels, and equities created by the bank-

rupts, and he has no greater rights than the bankrupts would have had.

2. The bankrupts by shipping the cotton appropriated it to the contracts and thereby passed title.

3. The bankrupts and their trustee are estopped to deny the validity of the forged documents, and to set up their own fraud as the basis for a claim of title in themselves.

4. The purchasers might, perhaps, have refused the cotton and rescinded the title on discovering the delay in shipment, but they did not do so. The bankrupts could not have based a claim of title on their own fraudulent delay in making the shipment, and the trustee stands in their shoes.

5. If the transaction had been an ordinary sale for cash, no one would deny that title passed on shipment. It passed none the less because the bankrupts, through fraud, obtained the money before they shipped the cotton.

## Effect of Findings of Fact.

The findings of fact of the Circuit Court (Record, pp. 175-177) are, of course, not subject to review here. The evidential facts were undisputed and the Court found the ultimate facts.

By Sec. 649 of the Revised Statutes it is provided that

"The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."

By Sec. 700, it is provided:

"When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

Only questions of law are reviewable by this Court. The facts are concluded by the findings of the Court below as they would be by the verdict of a jury.

In Dooley *v.* Pease, 180 U. S. 126, this Court said:

"Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review. It matters not how convincing the argument that upon the evidence the findings should have been different."

To the same effect:

Tyng *v.* Grinnell, 92 U. S. 467.
Norris *v.* Jackson, 9 Wall. 125.

The petitioner argues (Brief, p. 88) that the agreed facts in the case were the ultimate facts, and that the findings of the Circuit Court are findings of law. It is submitted that the agreed facts were the evidential facts, and not the ultimate facts. It was for the Court, as it

would have been for a jury, to draw from the agreed statement its conclusions of fact. For example, the finding as to the intent of Knight, Yancey & Company in making the shipment is plainly a finding of fact. The finding as to Knight, Yancey & Company's intention to suppress the bills and allow the spinners to claim the cotton on the forged bills is plainly a finding of fact, and the finding as to estoppel is a finding of mixed fact and law (see p. 46, *infra*).

The petitioner claims (Brief, p. 88) that the Circuit Court should have incorporated in its findings the entire agreed statements of facts, and that its failure to do so constitutes reversible error. It seems hardly necessary, however, to refer to the decisions which hold, not only that a trial court is not bound to rehearse in its findings all the evidential facts, but that proper practice requires that it find only the ultimate facts. As this Court said in Alexander *et al. v.* Maclean, 147 U. S. 71, at 76:

"In construing the act of 1875 the following propositions may be regarded as settled: * * *

"That it is only the ultimate facts which the court is bound to find and that this court will not take notice of a refusal to find the mere incidental facts which only amount to evidence from which the ultimate fact is to be obtained."

South Chicago Elevator Co. *v.* United Grain Co., 165 Fed. 132, at 135.

In Merchants Mutual Insurance Co. *v.* Allen, 121 U. S. 67, this Court said:

"In the present case the ultimate fact to be proved was the seaworthiness of the vessel. That

ultimate fact has been found. What the Company wanted to have incorporated in the findings were the 'mere incidental facts' which only amounted to evidence from which the material fact of seaworthiness or unseaworthiness was to be ascertained. This was properly refused."

## POINTS.

### FIRST.

**The Trustee stands precisely in the shoes of Knight, Yancey & Co. and has no better title nor greater rights than Knight, Yancey & Co. had prior to the adjudication.**

There is no claim whatever in the petition that the spinners received a voidable preference, or that there was any conveyance in fraud of creditors. Any intention to claim a preference was disavowed by the plaintiff below in open court (Record, p. 16); and no claim of fraudulent conveyance has been or, under the pleadings, could be made. The petition in the Circuit Court (Record, pp. 1-7) simply alleges (p. 6):

"Your petitioner further avers that the said 1311 bales of cotton were at the time of the bankruptcy proceedings and have ever since been the property of Knight, Yancey & Company, and that as Trustee in Bankruptcy of the said Knight, Yancey & Company, your petitioner as aforesaid is the owner of and has the right, title and interest in and to the said 1311 bales of cotton."

The supplemental and amended petition (Record, pp. 12, 13) alleges (p. 13):

"Your petitioner reiterates that the title to all of the cotton described in said original petition was in said Knight, Yancey & Company, Bankrupt, and is in said bankrupt estate and in your petitioner as the Trustee," etc.

The petition, therefore, squarely takes the position that at the time of adjudication title was in the bankrupts, and that the trustee has simply succeeded to that title. There is no claim or hint that the trustee's rights are greater than the bankrupts' would have been. This in itself is a sufficient answer to the petitioner's contention that he has rights greater than those which the bankrupts had.

Considering the contention on the merits, but without waiving the point that, under the pleadings, no such contention is admissible, the general rule is well settled—and appears to be conceded by the petitioner—that a trustee in bankruptcy takes the estate subject to all claims, liens, equities, and estoppels to which it was subject in the hands of the bankrupts. As this Court said in Zartman *v.* First National Bank, 216 U. S. 134 at 138:

"The trustee takes the property of the bankrupt not as an innocent purchaser, but as the debtor had it at the time of the petition, subject to all valid claims, liens and equities."

It was held in this case that a contract could be reformed as against a trustee in bankruptcy to the same extent as against the bankrupt.

The same rule is laid down in Hewit *v.* Berlin Machine Works, 194 U. S. 296, and in York Mfg. Co. v. Cassell, 201 U. S. 344.

So in Yeatman v. New Orleans Savings Institution, 95 U. S. 764, in upholding the lien of a pledgee on certain certificates of insurance which were the property of the bankrupt estate, this Court said:

"The established rule is, that, except in cases of attachments against property of the bankrupt within a prescribed time preceding the commencement of proceedings in bankruptcy, and except in cases where the disposition of property by the bankrupt is declared by law to be fraudulent and void, the assignee takes the title subject to all equities, liens or incumbrances, whether created by operation of law or by act of the bankrupt, which existed against the property in the hands of the bankrupt. *He takes the property in the same 'plight and condition' that the bankrupt held it.*"

In Collier on Bankruptcy, 6th Ed., p. 589, it is said:

"It is well settled that the trustee takes, not as an innocent purchaser, but subject to all valid claims, liens and equities. Thus *he has no better title than the bankrupt had.*"

In accordance with these principles, it was held in Donaldson *v.* Farwell, 93 U. S. 631, that a vendor defrauded by the bankrupt had, as against the trustee, the same option to disaffirm the contract of sale and retake the goods that he would have had as against the bankrupts.

It is well settled that, under the foregoing principles, *estoppels* good against a bankrupt are binding on the trustee.

Lowell on Bankruptcy, § 313.

In Re McKenna, 9 Fed. Rep. 27 at 33, 34, the Court said:

"The assignee, for example, takes * * * subject to the estoppels on the bankrupt, where they do not grow out of some fraud on creditors."

So in Allen *v.* Whittemore, 8 Ben. 485, Fed. Cas. No. 241, a trustee in bankruptcy was held estopped by the bankrupt's representation as to his place of residence.

A particularly valuable case in this connection is Re McKay & Aldus, 1 Low. 345; Fed. Cas. No. 11978; 3 Nat. Bankr. Reg. 2 ed. 50, where a trustee in bankruptcy was held estopped by a fraud on the part of the bankrupt exactly similar to that in the present case. This decision is quoted and discussed at pp. 42, 43, *infra.*

The case of Aldine Trust Co. *v.* Smith, 182 Fed. Rep. 449, discussed at pp. 43-45, *infra,* is also closely in point.

The same rule as to estoppel is applied by the English courts.

In Harris *v.* Truman, L. R. 9 Q. B. D. 264, the Court of Appeal, in holding that the trustee of a bankrupt agent was not entitled to certain goods in the possession of the bankrupt, said:

"It seems to me if Fairman (the bankrupt) had been the plaintiff in this action, it would have been impossible to allow him to set up his own fraud, after he had stated by his accounts that all the barley upon his malting premises had been bought by him for the defendants, and had been approved of by them and was to be malted for their benefit, and to be paid for by them; he would

have been estopped from setting up his own fraud; and as he would have been estopped, his trustee in bankruptcy, who is suing upon the relation between him and defendant, is just as much estopped as he was. Therefore in every point of view the trustee in bankruptcy is disabled from recovering against the defendants."

But the petitioner claims that as trustee, he has in the present case, rights superior to those of the bankrupts,—in effect the rights of an attaching creditor. It will be observed that this case arose prior to the amendment to the Bankruptcy Act of June 25, 1910. That amendment has no application to cases pending at the time of its passage, and therefore none to the present case. The question depends on the law as it was prior to that amendment.

The rights of a trustee prior to the amendment are clearly stated in Remington on Bankruptcy, Vol. I, p. 666, as follows:

"The Bankruptcy Act, itself, then, gives the trustee by § 70 (a) not only the bankrupt's own title, but, also, expressly vests in him, by § 70 (b) (4), title to all property transferred by the bankrupt in fraud of creditors, and by § 70 (e) gives him the right to clear away from the bankrupt's title to property all fraudulent transfers of such title which any creditor might, under State law, have avoided; and by § 67 (a) gives him the right to clear away from the bankrupt's title to property all liens that would for any reason not have been valid liens against the claims of creditors under State law had there been no bankruptcy; all which rights are in addition to the peculiar rights conferred on the trustee by the special provisions of the Bankruptcy Act relative to avoiding preferential transfers and liens obtained by legal pro-

ceedings within the four months preceding the bankruptcy."

And in Vol. III, p. 283:

"* * * The underlying theory of the Act of 1898, as well as of all former acts of the United States, and also of those of England, denied to the trustee in bankruptcy any right which the creditors merely *might* have exercised, but had not already actually exercised, or placed themselves in position, under State law to exercise, the idea being that the bankruptcy adjudication in no wise in and of itself affected the title, but merely transferred whatever right the bankrupt or any of his creditors actually had acquired—save and except always, of course, as to preferences and liens by legal proceedings within the four months' period, voidable by the peculiar provisions of Bankruptcy Law."

In the present case there is no voidable preference, fraudulent transfer, transaction made void or fraudulent by State law, or liens acquired by legal proceedings within four months. There was no judgment creditor, attaching creditor, or other creditor "armed with process." No creditors had acquired rights on the property in question. Under such circumstances the authorities discussed above show that the trustee stands in the bankrupt's shoes and has only the bankrupt's rights. He did not by virtue of his appointment acquire the rights of a creditor armed with process.

York Mfg. Co. *v.* Cassell, 201 U. S., 344.

In the York Mfg. Co. case, that company had sold certain machinery on the agreement that it was to retain a lien thereon for the purchase price.

The machinery was duly delivered to the purchaser, who thereafter was adjudicated a bankrupt. The question was as to the validity of the York Mfg. Co.'s lien as against the trustee. The contract of sale, whereby the lien was created, had not been filed, as required by the laws of Ohio, the State in which the transaction took place. Under the State law, failure to file the contract did not affect its validity as between the parties, but did render the lien "void as to creditors who before its filing had 'fastened upon the property' by some specific liens." The question was, therefore, squarely raised as to whether the trustee stood in the position of an attaching creditor or in that of the bankrupt. This Court said:

"The question is simply whether the York Manufacturing Company has a right under its conditional sale of the machinery to the bankrupt corporation to take the machinery out of the premises where it was placed as against all except judgment or other creditors by some specific lien. There are no judgment creditors in the case, and no attachment has been levied, and the question is simply whether the adjudication in bankruptcy is equivalent to a judgment or an attachment on the property, so as to prevent the York Manufacturing Company from asserting its right to remove the machinery by virtue of the reservation of title contained in its contract. * * * We come then to the question whether the adjudication in bankruptcy was equivalent to a judgment, attachment or other specific lien upon the machinery. The Circuit Court of Appeals has held herein that the seizure by the Court of Bankruptcy operated as an attachment and an injunction for the benefit of all persons having interests in the bankrupt's estate.

"We are of opinion that it did not operate as a lien upon the machinery as against the York

Manufacturing Company, the vendor thereof. Under the provisions of the Bankruptcy Act, the trustee in bankruptcy is vested with no better right or title to the bankrupt's property than belonged to the bankrupt at the time when the trustee's title accrued. At that time the right, as between the bankrupt and the York Manufacturing Company, was in the latter company to take the machinery on account of default in the payment therefor. The trustee under such circumstances stands simply in the shoes of the bankrupt, and, as between them, he has no greater right than the bankrupt. This is held in Hewit *vs.* Berlin Machine Works, 194 U. S. 296. The same view was taken in Thompson *vs.* Fairbanks, 196 U. S. 516. It was there stated that 'under the present Bankruptcy Act the trustee takes the property of the bankrupt, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt.' (See Yeatman *vs.* Savings Institution, 95 U. S. 764; Stewart *vs.* Platt, 101 U. S. 731; Hauselt *vs.* Harrison, 105 U. S. 401.) The same doctrine was reaffirmed in Humphrey *vs.* Tatman, 198 U. S. 91. The law of Ohio says the conditional sale contract was good between the parties, although not filed. In such a case the trustee in bankruptcy takes only the rights of the bankrupt where there are no specific liens, as already stated."

The petitioner relies on the two later cases of Security Warehousing Co. *vs.* Hand, 206 U. S. 415, and Knapp *vs.* Milwaukee Trust Co., 216 U. S. 545. These are perfectly different cases, and raised entirely different questions. They did not overrule nor profess to overrule the York Mfg. Co. case. On the contrary, the Court in the Security Warehousing case went out of its way to reaffirm the doctrine of that case. It has also

been cited with approval in Bryant *vs.* Swofford Bros., 214 U. S. at 291; Richardson *vs.* Shaw, 209 U. S. at 378; and Coder *vs.* Arts, 213 U. S. at 235.

Both the Security Warehousing case and the Knapp case came up under a Wisconsin statute, quoted at page 555 in the Knapp case. It provided that every sale of goods in the vendor's possession not accompanied by delivery and followed by a continued change of possession should be

"presumed to be fraudulent and void as against the creditors of the vendor, * * * and shall be conclusive evidence of fraud, unless it shall be made to appear * * * that the same was made in good faith and without any intent to defraud." * * *

The statute contained similar provisions regarding chattel mortgages. In the Security Warehousing case it was held that a pledge made under circumstances violative of the statute, where there was no change of possession, was void. The Court discussed and reaffirmed the cases of Hewit *vs.* Berlin Machine Works, York Mfg. *vs.* Cassell, and Thompson *vs.* Fairbanks, and went on to say (at p. 425):

"The case at bar bears no resemblance in its facts to the cases just cited. There was no valid disposition of the property in the case before us, or any valid lien. The so-called warehouse receipts * * * gave no lien under the law in Wisconsin."

In the Knapp case a mortgage was involved. The provisions of the State law already referred to had not been complied with, and the Court ac-

cordingly held the mortgage void as against all creditors, following, as it was bound to do, the provisions of the State law.

Taking these three decisions—the York Mfg. Co. case, the Security Warehousing case, and the Knapp case—together, they hold that a trustee in bankruptcy succeeds to the title of the bankrupt and to rights enforcible under the State law by *general creditors,* but not to those enforcible by attaching or execution creditors, unless there were in fact such attaching or execution creditors who had obtained specific liens on the property in dispute.

The law being in this state, the amendment of June, 1910, to Section 47 of the Bankruptcy Act provided that, as to all property in the custody of the bankruptcy court, the trustee should be

"deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied."

This amendment makes the law more nearly what the petitioner asserts; but it was quite different before the amendment.

In Remington's Bankruptcy, Vol. III, p. 284, it is said:

"However, the courts * * * relegated the trustee to the 'shoes of the bankrupt,' where he remained until the amendment of 1910, which lifted him out of the shoes of the bankrupt and placed him in the position of a creditor 'armed with process.'"

At p. 293 of Vol. III, Remington speaks of the amendment as effecting a "radical change in the theory of the trustee's title."

In Collier on Bankruptcy, 9 ed., pp. 999, 1000, it is said that the amendment of 1910

"vests the trustee with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings on property in the custody, or coming into the custody, of the bankruptcy court; this amendment has extended the title of the trustee, so that he has more than the limited title of the bankrupt."

It may be added that, if any question as to the meaning of the Bankruptcy Act in this regard did exist prior to the amendment of 1910, that amendment has removed it; and the argument that certiorari should be granted because of uncertainty as to the meaning of the Act has, therefore, no weight.

It is also submitted that, even if the trustee were in the position of an attaching creditor, his rights would still be subject to those of the spinners in the present case. (See authorities, p. 47, *infra*). Possibly a *bona fide* purchaser of the genuine bills of lading would have rights superior to the spinners', though, under the decision in the *Idaho*, 93 U. S., 575, this is extremely doubtful. It is, however, clear that no one else would have superior rights.

The petitioner refers (Brief, pp. 33, 34) to §4287 of the Code of Alabama reading as follows:

"All deeds of gift, all conveyances, transfers and assignments, verbal or written, of goods, chattels or things in action made in trust for the use

of the person making the same, are void against creditors existing or subsequent of such person."

It is argued that this statute makes the rights of the spinners void as against the trustee. There is no reference to this statute in the petition, nor has it ever before been referred to in this litigation. No contention is presented by either pleadings or assignments of error to the effect that the present is a case of conveyance void as to creditors under State law; and no such question is properly before the Court. The argument may, however, be briefly answered as follows:

The statute makes void conveyances in trust for the grantor. So far as the respondents are able to perceive, it has not the remotest bearing on the state of facts here presented. Its purpose is to make voidable conveyances where the real object is to put the property conveyed beyond the reach of creditors, while retaining a beneficial interest in the grantor. This is well stated in Howell *v.* Carden, 99 Ala. 100, at 111, as follows:

"It is not permissible for one creditor to use his claim for the purpose of shielding the debtor's property from his other creditors. Though one of the objects of such creditor is to secure the payment of his own debt, yet, if the arrangement by which this is done involves the intent on his part to aid the debtor in holding his property against his other creditors, then such arrangement is fraudulent and void as to creditors participating therein. To be valid, the arrangement must be *'without any intent to lock up the property from creditors for the use of the debtor.'*"

Obviously the spinners here had no "intent to aid the debtor in holding his property against his other creditors."

And see Crawford *v.* Kicksey, 55 Ala. 282, at 294.

The authorities quoted in connection with the statute at page 34 of the petitioner's brief are cases where the conveyance was only colorable, and where the grantor by consent of the grantee retained the real control. Benedict *v.* Renfroe, 75 Ala. 121, referred to by petitioner at some length (Brief, p. 82), is such a case. There is nothing of that sort here.

On the contrary, in the present case the finding of the Circuit Court is conclusive that the bankrupts' intent was to pass title, not to retain it,—to make a real conveyance, not a colorable one. Under the law of Alabama, preferences are lawful, even when the debtor is known to be insolvent.

> Crawford *v.* Kicksey, 55 Ala. 282 at 293.
> First Nat. Bank *v.* Smith, 93 Ala. 97 at 98.
> Levy & Co. *v.* Williams, 79 Ala. 171 at 175.
> Seaman *v.* Nolen, 68 Ala. 463 at 466.

Retention of possession by a grantor is, under the Alabama law, open to explanation, and, if the intent is not to reserve to the debtor fraudulent control over property ostensibly conveyed, such retention is lawful.

> Mayer *v.* Clark, 40 Ala. 259 at 269.
> Ullman *v.* Myrick, 93 Ala. 532 at 537.
> Crawford *v.* Kicksey, 55 Ala. 282 at 300.

Here the Circuit Court has found that the genuine bills of lading were retained not in order to

keep title but in order to suppress them and conceal the fraud. It is conclusively established by the findings that there was no such colorable conveyance and real retention of the property as is denounced by the statute. The statute has absolutely no application to this case.

The petitioner's argument to the effect that the retention of the bills of lading gave the bankrupts the *jus disponendi*, and therefore title, may more fitly be answered in connection with the discussion of the effect of the retention of the genuine bills of lading at pp. 48-53, *infra*.

It is submitted with absolute confidence that the Courts below were right in holding that, there being no attaching or judgment creditor, no claim of voidable preference or of conveyance in fraud of creditors, and no transaction void as against creditors under state laws, the trustee stands in the shoes of the bankrupts, and can enforce no rights which they could not have enforced.

The question then presented is, What rights would Knight, Yancey & Company have had, had there been no bankruptcy?

## SECOND.

**The shipment by Knight, Yancey & Company was an appropriation of the cotton to the contracts of purchase and to the first set of bills of lading, and title passed immediately upon the shipment to the spinners.**

As a preliminary to considering the facts of the present case, it is believed that it may be useful (1) to recall certain principles of the law of sales regarding the passage of title on shipment by carrier; (2) to examine the decisions as to "c. i. f." shipments; and (3) to consider what the legal relations of the parties would have been, and when title would have passed, if the sale had been honestly carried out.

1. *Where goods are sold to be shipped by carrier, title ordinarily passes upon such shipment, especially where the price has been paid.* This principle is well settled, and rests on the proposition that shipment is an appropriation of the goods to the contract and that the seller's duty ends with delivery to the carrier.

Benjamin in his work on Sales says (p. 343):

"The property is transferred the moment the dispatch or other act has commenced, for there an appropriation is made finally and conclusively by the authority conferred in the agreement, and in Lord Coke's language: 'The certainty,, and thereby the property begins by election.' "

At page 350 Benjamin states it to be:

"Settled law, that where a seller delivers goods to a carrier by order of the purchaser, the appropriation is determined; the delivery to the carrier is a delivery to the buyer and the property vests immediately.

"And in the United States the law is established to the same effect."

See 24 Am. & Eng. Ency. of Law, 2 ed., pp. 1059, 1071.

In Williston on Sales, pp. 398-400, the law is stated as follows:

"By far the commonest and most important illustration of the transfer of property in goods by subsequent appropriation by the seller arises where the seller, in fulfillment of a contract with, or an offer from the buyer, delivers goods to a carrier for shipment to the buyer. That the property passes on delivery to the carrier, under these circumstances, was settled indeed before the general rules as to appropriation by the seller had been completely formulated. * * * Whatever reasons may be given for the rule, it is well settled both in England and in this country."

In United States *v.* Andrews, 207 U. S. 240, this Court said:

"That where a purchaser of goods directs their delivery for his account to a designated carrier, the latter becomes the agent of the purchaser, and delivery to such carrier is a legal delivery to the purchaser, is also beyond question."

2. *Shipment C. I. F.*—The contracts of sale, Exhibits 1 to 8, inclusive (Record, pp. 79-86), provide for shipment to Genoa "c. i. f." The mean-

ing of this provision is well settled by the decisions. Under it the duty of the vendor is not to deliver at destination, but merely to deliver to carrier. Title thereupon passes, either upon shipment or at least upon indorsement of the bills of lading, and discount of the drafts, and the risk during transit is upon the buyer. The rule is well stated by Professor Williston at page 408, of his Sales, as follows:

"In British contracts the letters 'c. i. f.' or 'c. f. i.' standing for cost, freight and insurance, are in common use, and signify that the price fixed covers not only the cost of the goods but the expense of freight and insurance to be paid by the seller. *And under such a contract it seems that no inference is permissible that the seller was bound to deliver at the point of destination.*"

In Mee *v.* McNider, 109 N. Y., 500, A contracted to sell and B to buy certain goods, to be shipped by the seller c. i. f. to New York. The Court said:

"The relation between the parties was that of vendor and vendee. The former, residing in London, undertook to sell, and the latter, residing in New York, undertook to buy the articles named. The price is fixed at 59s. per cwt., and this is made up of the cost, the freight and the premium of insurance. Thus the purchaser deals with the matter in gross and not in detail, transacts the various branches of the business with one person instead of three, fixes his liability at a lump sum, and in case of loss will recover the amount of his interest under the policy.

"On the other hand, the vendor is to be reimbursed for his advances at the same time and in the same manner that he receives payment for the goods. Only one condition is to be performed, that of shipment by steamer * * *. On the

part of the vendor the shipment by steamer was an effectual appropriation of the cocoa to the buyer and at that moment the agreement on the vendor's part was executed."

To same effect Easton *v.* Wostenholm & Son, 137 Fed. 524, at 530-532.

A very valuable case on this subject is that of Bowden Bros. *v.* Little, 4 Comm. 1364, decided by the High Court of Australia in 1907. The contract called for the shipment of goods from Japan to Australia and contained the following provisions: "Prices c. i. f. Sydney"; "Finance 30 days s/draft against documents through Com. Bk. of Aus." The trial court instructed the jury that under this contract it was the duty of the seller to deliver in Australia. This was held error, the court saying (p. 1376):

"One of the recognized legal incidents of such a contract is 'that the shipper fulfils his obligation when he has put the cargo on board and forwarded to the purchaser a bill of lading and policy of insurance with a credit note for the freight.' Per Lord Davey in Stroms Bruks Aktis Bolag *v.* Hutchinson, (1905) A. C., 515, at p. 528."

The opinion discusses the nature of a c. i. f. contract and describes the character of the documents and the course of business thereunder, stating the exact practice followed, apart from the fraud in the present case.

See too

Tregelles *v.* Sewell, 7 Hurls. & N. 574, where it was held in the Exchequer and affirmed in the Exchequer Chamber that under a contract reading "delivered at Harburgh, cost, freight, and insurance", the seller's duty was only to place the

goods on a vessel bound for Harburgh and that the risk in transit was on the buyer.

Stroms Bruks Aktie Bolag *v.* Hutchison, 1905, App. Cas. 515 at 528;
Ireland *v.* Livingston L. R. 5 H. L. 395, 406;
Hamlyn & Co. *v.* Griendtsveen Co., 6 Times Law Rep. 274;
Parker *v.* Schuller, 17 Times Law Rep. 299;
Delaurier *v.* Wyllie, 17 Ct. Sess. Cas. 4th Series 167.

3. *Legal relations arising in the course of an honest transaction.* From what has already been said it is plain that if the bills of lading acquired by the spinners had been genuine and if the cotton had been duly shipped, title to it would have passed on shipment. Knight, Yancey & Company would then have done their part under the contract of sale by appropriating the cotton, delivering it to the carrier and paying the freight.* They would still have held a lien for the purchase price by virtue of their possession of the "shipper's order" bills of lading, but, as soon as they discounted their drafts with the indorsed bills of lading attached, this security title would have passed to the discounting bank, and would have been finally extinguished when the spinners accepted the drafts and thereupon received the bills of lading.

The spinners would have been the ones to gain

*The railroad freight to New Orleans was paid by Knight, Yancey & Co. on shipment, as appears from the bills of lading. The ocean freight was "collect" and therefore was payable to the ocean carrier by the purchaser of the cotton. The purchaser was however, reimbursed for this payment by Knight, Yancey & Co. because Knight, Yancey & Co.'s drafts were drawn for the purchase price less ocean freight. (See invoices, Record, pp. 117-128). Thus Knight, Yancey & Co. actually paid the entire freight, both inland and ocean.

or lose if the cotton increased or diminished in value during the transit; and in case of the bankruptcy of the holders of the bills of lading the spinners could have obtained the cotton upon payment of the draft to secure which it was held (Williston, Sales, pp. 419, 461 and cf. p. 399). Risk of loss in transit would also have been upon the spinners. If, then, the transaction had been honestly carried out, title, subject to the banker's lien, would have been in the spinners from the time of shipment, and full and complete title would have vested in them as soon as they had accepted the drafts and received the indorsed bills of lading.

4. *The Actual Transaction.*—It is obvious that the forged bills of lading and the documents thereto attached were designed by Knight, Yancey & Company as a representation that the contracts of purchase had been performed (Exhibits 1-8). This is made clear by a comparison of the documents, particularly the invoices (Record, pp. 117-128) with the contracts of purchase. The respective invoices corresponded with the respective contracts of purchase in the following particulars: (1) Name of the purchasing spinner; (2) date of order*; (3) price; and (4) discounts. The drafts were drawn pursuant to the terms of the contracts, both as to amount, time, and name of drawee. Each invoice referred to the corresponding draft by number. The quantity of cotton stated in each forged bill of lading was the quan-

*In two or three instances, cables sent by Knight, Yancey & Company on one day were received by Gavirati on the next day, in which case the invoice bears the date when the cable was sent and the contract the date when it was received. This is explained in the statement of facts (Record, p. 50).

tity called for by the contract of sale, save that in some instances it covered only a part of the contract quantity. The ostensible shipments were in the months specified in the contracts. The consignment and routing of the cotton were as stipulated in the contracts. The quality called for by the contracts corresponded with the "type" stated in the left hand margin of the drafts. Each invoice gave the marks (a combination of four letters) supposed to be upon the cotton. The same mark also appeared upon the corresponding draft, forged bill of lading and the insurance certificate. The entire set of documents were exactly the documents which would have evidenced an actual shipment under the contracts of purchase to which the documents refer. There is and can be no dispute that Knight, Yancey & Co. by the fraudulent bills of lading and the documents attached thereto represented that cotton had been shipped, pursuant to the contracts of purchase.

The purchase price was, as appears from the statement of facts, obtained by Knight, Yancey & Company and the petitioner upon faith of these representations. The forged bills of lading, duly indorsed, were delivered to the spinners respectively upon the acceptance of the drafts (Statement of Facts, par. 7, Record, p. 47) which was long prior to the actual shipment. The spinners thereupon became the absolute owners of the forged bills of lading.

> Hutchinson on Carriers, 3 ed., p. 202;
> National Bank *v.* Merchants Bank, 91 U. S., 92.

It is, of course, perfectly obvious that from the outset the design of Knight, Yancey & Com-

pany was to fulfil their contracts and cover their fraud by making a shipment under terms identical with those set forth in the forged bills of lading. They had been guilty of obtaining money on faith of forged documents. The only means by which such a deception could be concealed was by subsequently supplying the cotton, which the forged bills of lading purported to evidence.

Accordingly Knight, Yancey & Company made a shipment of cotton exactly in accordance with the forged documents already outstanding. While it is fully realized that the finding of fact as to Knight's intent in so doing is conclusive in this Court, it is believed that the Court will find convenient a very brief summary of the points in which the cotton actually shipped and the genuine bills of lading, on the one hand, are identified with the original contracts of purchase and forged bills of lading, on the other hand.

(1) The contracts called for *nine* different grades of cotton. *The cotton actually shipped was in each instance of precisely the grade called for by the contract.* (Statement of facts, paragraph 14; Record p. 51). This could not have been accidental.

(2) The forged bills of lading and the documents attached to them bore the following marks, purporting to identify the cotton: PSEX, TSXS, TSST, TSLL, TSSI, QSMP, TSAG, QNET, SDON, TSCI, TSCZ, TSPG and TSIC. When Knight, Yancey & Company actually shipped the cotton, they marked it with identically these marks (Statement of facts, paragraph 8; Record p. 48). It was their custom to use such combinations of letters and these *"combinations were*

*never repeated unless by accident or at long intervals of time."* (Statement of facts, par. 16; Record p. 51). This coincidence of marks is an absolutely conclusive indication of the intent of Knight, Yancey & Company. By issuing the forged bills of lading, they announced their intention to fill the contracts with cotton marked as therein stated. They then actually did ship cotton bearing these marks, *and thereby filled the contracts.* That such marks are amply sufficient to identify a particular lot of goods is undeniable.

Hentz *v. Idaho*, 93 U. S. 575.

(3) The cotton was actually shipped under precisely the same routing which the contracts of purchase called for, namely, under a through bill to Genoa, via the Cotoniera Line.

(4) The forged bills of lading and genuine bills of lading were precisely identical so far as human foresight at the time of making the forged bill could anticipate how the genuine bill would afterwards be drawn. They not only correspond bill for bill in quantity and in marks, in consignment and in routing, but also in each instance *the statement of the weight of the cotton in pounds, which appears on the forged bill, is repeated in the genuine bill.* For example, on lot TSST the forged bill, Exhibit 10, states the weight at 50323 pounds (Record p. 98); the genuine bill, Exhibit 60, also states the weight at 50323 pounds (Record p. 67). Obviously both these weights were fictitious, because at the time when the forged bill was drawn the weight of the cotton which was to be shipped two months later could not possibly have been known. The statement of the same weight was, therefore, deliberately repeated in the genuine

bill, although it was then known not to be the true weight. This is a striking indication of the studious care which Knight took to render to two sets of bills of lading identical in order to make sure that the spinners would get the cotton without discovery of the fraud.

(5) In addition to the foregoing, the two sets of bills of lading were dated at the same places. Those marked PSEX, TSXS, TSST, TSLL, PSSI, QSMP, TSAG and QNET were in both cases dated at Decatur, Ala., and were signed with the name of T. G. Morrow, the railroad agent there. Those marked SDON, TSCI, TSCZ, TSPG and TSIC were in both cases dated at Selma, Ala., and signed with the name of J. W. Hunter, the railroad agent there. It appears from the statement of facts, paragraph 3, that Morrow and Hunter were the agents by whom the Southern Railway's bills of lading were customarily signed at Decatur and Selma respectively.

(6) The two sets of bills were also on the same form. In the case of the forged bills Knight actually obtained and used some of the blank forms in use by the Southern Railway (Statement of facts, paragraph 3; Record, p. 47). The same forms were used for the genuine bills.

Knight, Yancey & Company's intent to appropriate the cotton, to enable the spinners to get it, and to suppress the genuine bills of lading is further shown by their concealment of them from the receivers, and retention of them until after the appointment of the trustee some six weeks after the bankruptcy (pp. 6, 7, *supra*).

It is clear, therefore, that the intent of Knight, Yancey & Company was that the real cotton should be in the same position as if it had

been shipped under the forged bills, in which case title would have passed on shipment. The motive for the fraud is obvious; the motive for concealing it is equally obvious; the means taken for concealing it were the only ones possible, and necessarily involved the forwarding and delivery of the cotton to the spinners under identical marks and routing. As necessarily, they involved the suppression of the genuine bills by Knight, Yancey & Company.

In Hentz *v.* The *Idaho,* 93 U. S. 575, a shipper obtained from the brig *Colson* a bill of lading bearing certain marks, which purported to evidence a shipment of cotton similarly marked. Later, the shipper delivered some cotton, so marked at the *Colson's* pier. He subsequently took it away and shipped it by another vessel to another person, taking and negotiating a bill of lading of that vessel also. This Court said:

"That the cotton thus delivered to the *Colson* was intended to fill the bills of lading, one of which had been previously given, *is incontrovertible.* They were so intended by the shipper. If not, why were they thus marked? * * *

"The cotton delivered on the 8th of April on the pier for the *Colson,* and received by the mates of the brig, became, therefore, *at the instant of its delivery* the property of Porter & Company, who were then the indorsees of the bills of lading. Its subsequent removal by Forbes to the *Ladona,* either with or without the consent of the brig's officers, could not divert that ownership."

The holder of the first bill of lading was therefore held entitled to the cotton.

Under the general law of sales, then, and particularly under a c. i. f. contract, title passes on shipment. This cotton had been shipped; the

price had been paid; and the Court below found as a fact, that by shipping it, Knight, Yancey & Co., intended to appropriate it to the contracts. A finding that title passed follows inevitably.

## THIRD.

### Estoppel.

The petitioner is subject to the principles of estoppel in two ways:

(1) Knight, Yancey & Company by the forged bill of lading impliedly warranted their title to the cotton marked as therein stated,—therefore their subsequently acquired title enured to the benefit of the spinners on familiar principles; (2) Knight, Yancey & Company and their trustee are estopped by the representation in the forged bills to deny that those bills were valid; or that the cotton was shipped as stated therein; or that the cotton in suit is the cotton there described.

(1) It is well settled that where personal property is sold, the vendor is held to be a warrantor of his title and right to convey.

> Tiffany on Sales, 165.
> Benj. Sales, 5 ed., p. 598.

The forged bill of lading was a representation and warranty by Knight, Yancey & Company that they owned certain cotton of the quantities and qualities, and bearing the marks, indicated in the forged bills of lading, and shipped and routed

as therein stated. Their indorsement of those bills, and their final delivery indorsed in blank to the spinners, was a sale thereof with warranty. As soon as they acquired this cotton, and as soon as its identity with that described in the forged bills of lading was made manifest by the marking of the cotton in accordance with the forged bills, its identity in quantity and quality, its segregation from the other cotton of Knight, Yancey & Company, and its delivery to carrier, the title passed. The cases in the law of real property are familiar which hold that where a grantor delivers a deed covering land in which he has in fact no interest, and warrants the title, any title which he may subsequently acquire passes by estoppel to the vendee without any further instrument of conveyance.

Parker *v.* Marks, 82 Ala., 548;
White *v.* Patten, 24 Pick. 324;
Bush *v.* Marshall, 6 How. 284 at 291;
Bush *v.* Person, 18 How. 82.

The same principle applies to sales of personal property.

In Sherman *v.* Champlain Trans. Co., 31 Vt. 162, the Court said:

"If the conveyance from F. B. to J. A. Stevenson is regarded as containing no express warranty of title, there is always in such cases an implied warranty in regard to the conveyance of personalty, unless it appear to be the vendor's title and not the thing itself which is intended to have been conveyed. * * * So that the subsequently acquired title will inure to the benefit of the vendee, even if it did not pass in the first instance, by virtue of the estoppel."

The whole doctrine is well stated in the case of Faulkes *v.* Kamp, 3 Fed. Rep. 898, where it is said:

"Every seller of personal property impliedly warrants that he has title to and right to sell what he assumes to sell; his undertaking to sell includes an undertaking to that effect. * * * It is familiar law, and has been for a long time, that a warranty of title or right draws to it any after acquired right or title of the warrantor, and carries it to the benefit of the person to whom the warranty runs. So whatever right, if any, the defendants acquired to the invention covered by this patent enured directly to the benefit of the orators. * * * But the rights of the orators do not rest upon the estoppel merely; they rest upon the purchase, which must operate so that the orators may have what they bought, and so that the defendants *shall not both sell and keep the same thing.*"

The concluding words of the foregoing quotation are peculiarly applicable to the present attempt of the trustee in bankruptcy to obtain a second payment for cotton for which the bankrupts have been paid once.

(2) The matter may also be considered in another light, which brings it closely into line with the *Idaho.* The fraudulent bills of lading were *as between Knight, Yancey & Company and the spinners,* genuine bills of lading. Knight, Yancey & Company put them forward as genuine bills, with intent to secure the reliance of the spinners upon their validity. They did in fact rely upon them, and paid their money on the faith of Knight's representations. It is to be remembered in connection with all the branches of the case

that the spinners never had the slightest idea of giving credit to Knight, Yancey & Company. They paid only because they thought that the forged bills of lading *were cotton.* The estoppel is absolute.

In Layson *v.* Cooper, 174 Mo., 210, at 221, the Court said:

"By giving a mortgage on the corn, the defendant declared in the most solemn manner that it was his property, and unless he was deceived, as he says he was, into signing it, he deceived the plaintiff by that act and the law will not allow him to profit by it. It is no new doctrine that a man is estopped to deny the truth of his own assertion, when another has accepted it as true and acted upon it."

In Kelly *v.* Scott, 49 N. Y., 595, a suit between attaching creditors and trustees in bankruptcy, the trustees were held estopped to deny that certain persons were in fact members of the bankrupt firm, and that the creditors were entitled to all rights which they would have had if those persons had been members of the firm in question. The Court said:

"The principle of estoppel is too well understood and too firmly settled to require the citation of authorities. * * * The rule is always applied to enforce integrity and fair dealing in the business concerns of life. It prohibits one from denying his declarations to the injury of another who has acted upon the faith of them, and it applies as well to acts and conduct as to declarations. * * * Shawhan being estopped from denying the rights of the attaching creditor, his assignees (in bankruptcy) are also estopped. They have no other or superior rights to him, and they are vested with the property subject to all

equities against it in his hands. It was admitted upon the argument that if Mendall and Palmer had been in fact partners, the defendants would have had no title. The same result must follow if they are in a position with reference to the property where they cannot deny the partnership."

The estoppel is, as seen in Point I, *supra*, equally binding upon the petitioner, who stands in the shoes of Knight, Yancey & Company. The first set of bills of lading may, therefore, be considered as genuine bills issued in advance of the receipt of the cotton by the carrier. When the cotton was delivered by Knight, Yancey & Company to the carrier, it was a distinct appropriation of it to the previously negotiated bills of lading. This is squarely decided in the *Idaho*. Property in the cotton thereupon passed to the spinners. This is also squarely decided by the *Idaho*. The issue by the carrier of a second set of bills of lading is immaterial, especially where, as here, no rights of third parties are involved.

The doctrine of estoppel may be carried further. Knight, Yancey & Company and the petitioner, as their successor, are estopped, not only to deny the genuineness of the first set of bills of lading, but *to deny that the carrier received the cotton as and at the time when those bills stated.* By negotiating the forged bills they represented that on the dates which they bear, certain lots of cotton bearing certain marks and routed in a certain way were delivered to a carrier. It appears that at the time of adjudication, precisely those lots of cotton, bearing precisely those marks and so routed, were in the hands of that carrier. Neither Kinght, Yancey & Company nor the petitioner can

deny that this was the cotton which they represented in the forged bills of lading had been delivered to the carrier. They cannot deny that the carrier held it *under those bills of lading.*

An authority closely in point is *In re* McKay & Aldus, 1 Low. 345; Fed. Cas. No. 11978. In that case, certain builders made a contract to build a locomotive for a railroad company, to be shipped when completed to the railroad and paid for in cash. On November 3, they wrote the railroad that they were forwarding the engine and they enclosed what purported to be a bill of lading for it, and also a draft for the purchase price, which the railroad paid. The builders were adjudicated bankrupts on December 15. On November 3 there was no such engine in existence, and the document purporting to be a bill of lading for it was spurious. During November, the bankrupts were building two engines exactly alike, either of which would have answered the contract. One of these was delivered to another purchaser; the other was marked with the name of the petitioning railroad and was finished or practically so at the time of the bankruptcy. The trustee in bankruptcy denied the railroad's right to the engine, claiming that title had not passed; but it was held that he took subject to all claims good against the bankrupts and that title had passed. The Court said:

"But there is another view, which seems to me to establish a title in the petitioners by estoppel. The bankrupts and their assignees cannot deny that there was an engine finished and set apart for these petitioners, and paid for by them early in November. Here is such an engine. If this is not the engine referred to in the correspondence, it is for them to show the other which was. Sup-

pose the bankrupts had never built any other engine like this. Would they not be estopped by their acts and correspondence to deny that this chattel was completed on the 4th of November? The fact that there were two chattels precisely alike does not embarrass the case at all. * * * The argument was that the estoppel could not apply to a chattel not *in esse* at the time when the misrepresentation was made, but the foregoing consideration appears to be a sufficient answer, namely, that the assignees are estopped to say that it was not *in esse*, unless they show some other engine to which the representation did apply."

This decision has frequently been cited with approval; for example in the following cases:

Rowe *v.* Page, 54 N. H. at 195;
Dugan *v.* Nichols, 125 Mass. at 46;
Chace *v.* Chapin, 130 Mass. at 131;
Holmes *v.* Winchester, 133 Mass. at 142;
In re McKenna, 9 Fed. at 34.

*In re* Pease Car & Locomotive Works, 134 Fed. 919, is strikingly similar to the McKay & Aldus case. The court based its decision primarily on appropriation, and the two cases together indicate how readily either the appropriation or the estoppel argument applies. In each case the purchaser was held entitled to the property as against the trustee in bankruptcy, although in neither case had it been shipped to the purchaser, as here.

Aldine Trust Co. *v.* Smith, 182 Fed. Rep., 449, is a very important case on estoppel. There the Wilson Company had contracted to deliver tile for the construction of certain buildings. It borrowed money from a Trust Company, assign-

ing, as security for the loan, the money due as payment for the tile.

"The assignments not only stated that the moneys were then due but similar oral representations were clearly and indisputably made by the officers of the A. P. Wilson Company to an officer of the Trust Company when the loans were procured, and it was upon the faith of the assignments and of the representations thus made that the moneys were loaned."

Thereupon the Wilson Company went into bankruptcy, and its trustee claimed legal title to the tile. The Circuit Court of Appeals for the Third Circuit said:

"To permit the trustee of the A. P. Wilson Company to reclaim these tile, or, what amounts to the same thing, to claim the proceeds of their sale, would unquestionably work a fraud upon the trust company which loaned moneys, not upon the security of the tile or upon any pledge thereof, but upon the faith of statement made to it by the officers of the bankrupt, to the effect that it had no title thereto, but had parted with the same to the contractors, and that moneys, representing the price thereof, were due to it therefor, which moneys it was willing to assign the trust company as collateral security for the repayment of such loans. The tile were intended for and were delivered to certain buildings, and in view thereof, and of the assignments and of all the circumstances under which the loans were made, it seems essentially right and proper that *the trustee in bankruptcy, standing in the shoes of the bankrupt, should be held to be estopped* from denying what it then asserted, and claiming the proceeds of the sale thereof. It would be difficult to suggest a clearer case of estoppel. To claim the value of the tile, the bankrupt corporation, were it the actor in this proceeding, would have to admit that its

assignments, although duly authorized, were a fraud; that material statements contained therein were untrue; that its officers prevaricated when they said that moneys were due for the tile; that it thereby deceived and lulled to sleep the officers of the trust company, and fraudulently procured the loans in question; but that, notwithstanding all this, it should now be permitted to tell the truth and take the tile. Certainly no court of equity would assist the bankrupt under such circumstances. Having treated the tile as sold and the proceeds thereof as due, and having assigned the same as collateral security to the loans, *neither it nor its trustee will be heard to assert the contrary.*"

It will be noted that the intervention of the spinners in the case at bar presents the defence of estoppel in its most acute form. Where the very persons to whom the false representations were made, invoke the estoppel, it is submitted that it cannot be evaded.

One or two further lines of reasoning may be suggested. The practice of issuing bills of lading in duplicate is, of course, well known. The situation here is precisely analogous to a case where bills of lading have been issued by a carrier in duplicate. The forged bills and the genuine bills are, as between the parties here, practically duplicate bills. It is too well settled to require the citation of authority that in such a case, if the shipper endorse and sell one of the bills of lading he cannot thereafter, as against the purchaser, claim title in himself by virtue of the duplicate which he retains. See Williston Sales, p. 439.

It is undoubted law that goods under bill of lading may be conveyed by an instrument other than the bill of lading. This is illustrated by the case of Conard *v.* Atlantic Ins. Co., 1 Pet. 386. It

was there held that while goods were at sea under bills of lading the shipper, if he were owner, might convey them "by any assignment either on the bill of lading or by a separate instrument," and that the title so conveyed "will be good against all persons except such a purchaser for a valuable consideration by an endorsement of the bill of lading itself." In the light of this principle, the forged bills of lading, with their indorsements may be considered as bills of sale, whereby Knight, Yancey & Company transferred to the spinners certain lots of cotton marked as therein stated. These lots of cotton were subsequently identified by marking and shipment under the second set of bills of lading, whereupon the conveyance made by the indorsement and delivery of the first set of bill of lading became operative. The title of the transferee (the spinners) is, therefore, good "against all persons except a purchaser for a valuable consideration by an endorsement of the bill of lading itself." There is no such purchaser here.

In accordance with the principles and authorities discussed, the trial Court found (Finding 10; Record p. 177), "That Knight, Yancey & Co. and their trustee, plaintiff herein, are estopped to assert any right, title or interest in or to the said 1400 bales of cotton."

This finding alone is sufficient to support the judgment. Estoppel is, as this Court said in Leather Bank *v.* Morgan, 117 U. S. p. 122 "a mixed question of law and fact", and as such cannot be examined on writ of error.

Dooley *v.* Pease, 88 Fed. Rep. 446 at 448.
U. S. F. & G. Co. *v.* Board of Com'rs. 145 Fed. Rep. 144 at 151.

In view of the petitioner's apparent attempt to put the trustee in the position of an attaching or judgment creditor, it may be of interest to refer to the following authorities, which hold that even such creditors are bound by estoppels valid as against the debtor:

Morrison *vs.* Caldwell, 17 Am. Dec., 84 at 92.
Taylor *vs.* Agric. Assn., 68 Ala. 228 at 239.
Kimbal *vs.* Blaisdell, 5 N. H. 533.
Tefft *vs.* Munson, 57 N. Y. 97.
Austin *vs.* Buckman, 95 N. W. 128 (Wis.)
McBane *vs.* Wilson, 8 Fed. Rep. 734.

In 16 Cyc. 716 it is said:

"A levying creditor is bound by an estoppel against the debtor as grantor. So a purchaser at execution sale * * * is estopped by a deed made by the grantor before the sale."

The following quotation may also be of interest:

"A party cannot set up in his own favor an estoppel against himself created by his own act." (16 Cyc. 778).

## FOURTH.

### The Petitioner's Argument.

1. *Retention of the Genuine Bills of Lading.*

The petitioner argues that because Knight, Yancey & Company retained the genuine bills of lading, reading to shipper's order, therefore they retained title. It is, however, perfectly settled that the form of the bill of lading is only *prima facie* evidence as to where title lies and that it is open to explanation.

In The Carlos F. Roses, 177 U. S. 655, at 665, this Court said:

"The presumption of ownership arising from the bill (of lading) may be explained or rebutted by other evidence showing where the real ownership lies."

In Porter, Bills of Lading, Sec. 489, it is said:

"The cardinal principle in construing instruments of this character being the ascertainment of the parties' intention, the presumption arising from this form of the bill, that the vendor intended to retain such control of the goods as would prevent title from passing to the vendee, may be rebutted by evidence to the contrary. No incontrovertible legal effect is stamped upon the transaction by the use of such a form. The question is one of fact, not of law."

In Ogle *v.* Atkinson, 5 Taunt., 759, goods which had already been paid for by the buyer were shipped by the seller, who fraudulently represented that the form of the bills of lading was immaterial, and on that statement obtained from the

master of the vessel bills of lading to order of "blank," which he retained. It was held that title had passed by delivery to the master, who was plaintiff's agent, and could not be divested by the fraudulent act of the seller in attempting to retain title by the bill of lading.

In its element of fraud on the part of the seller, this case is like the present.

*"No fraudulent procurement of bills of lading in his favor can avail the seller to obstruct the acquisition of title in the buyer."*

2 Schouler, Pers. Prop., 3 ed. §273.

In Bradford *v.* Marbury, 12 Ala., 520, the defendant had agreed to buy a certain crop from the plaintiff, who was to put it in N's warehouse. The plaintiff did so, not notifying the defendants and taking the ware-house receipts in his own name. The Court said:

"We think it very clear that no question of *law*, decisive of the rights of the parties, arises out of this circumstance. The proper matter for the jury to ascertain was whether the delivery of the cotton to the warehouseman was made on account of the defendant, or did the plaintiff cause the receipts to be taken to himself to preserve his right of property."

Where bills of lading are taken to shipper's order, the question of title depends on the intent of the parties and is one of fact for the jury.

Dows *v.* National Exchange Bank, 91 U. S., 618.

Browne *v.* Hare, 4 Hurls. & N. 822.
Merchants' Nat. Bank *v.* Bangs, 102 Mass., at 295.
Hall *v.* Richardson, 16 Md., 396.

In the leading case of Joyce *v.* Swann, 17 C. B. N. S. 84, the Court of Exchequer Chamber said, per Williams, J. (p. 101):

"It was a question for the jury, and I think they were warranted in assuming that the guano was put on board pursuant to that contract, with the intention of transferring the property from the sellers to the buyer. It is true that *the bill of lading was taken in the names of the sellers, and at the time the insurance was declared was unindorsed.* That was a circumstance which was well worthy the attention of the jury, and might have induced them to come to a contrary conclusion. But, if they thought that, notwithstanding this, there were other circumstances sufficiently cogent to induce them to come to the conclusion that the property was intended to pass, I am of opinion that the mere circumstance of the form of the bill of lading and of the invoice being transmitted to the partner then in Ireland, instead of to M'Carter (the vendee) direct, was not sufficient to annihilate the other evidence in the cause, though it might induce the jury to pause."

The question as to the intention (which is of course a question of fact, Williston, Sales, p. 356; Tiedeman, Sales, §83) has been conclusively settled by the finding of the Circuit Court that Knight's intention was to appropriate the goods to the contracts, thereby passing title, and to suppress the genuine bills. This finding is not reviewable here; and its propriety is in any case obvious when, in addition to the considerations already discussed, it is remembered (1)

that the only way in which the fraud could be concealed was by shipping the cotton and suppressing the genuine bills; (2) that in order to insure delivery of the cotton to the spinners under the forged bills, it was necessary to have the genuine bills duplicates of the forged ones, so that no discrepancy would be noticed on delivery, and therefore to have the genuine bills read "shipper's order"; and (3) that Knight made no effort to raise money on the genuine bills, but retained them and concealed them even from the receivers and his trustee for many weeks.

It is suggested that, by retaining the bills of lading, Knight, Yancey & Co. retained the *jus disponendi*, and might have altered the destination of the goods, or retaken them from the carrier. But in the *Idaho*, 93 U. S. 575, it was specifically held that this was not so, and that a carrier must deliver to the true owner, even though some other person may hold the bills of lading.

See too, Nelson *v.* C., B. & Q. R. R., 2 Ill. App. 180, at 186, 187.
Hutchinson, Carriers, 3 ed., 211.

But the petitioner argues (p. 50 of his brief) that the *jus disponendi* is title, quoting from p. 415 of Williston on Sales, a passage which does not refer to any such state of facts as the present. The petitioner goes on to argue (Brief, pp. 81, 82) that, because of their possession of the genuine bills of lading, the cotton in question could have been transferred by the bankrupts within the meaning of §70a (5) of the Bankruptcy Law. It may be true that if Knight, Yancey & Company had negotiated the genuine bills of lading for value to an innocent third person, that person would

be entitled to priority (though such a conclusion seems inconsistent with the decision in the *Idaho*, 93 U. S. 575), but it does not follow that, because the bankrupts may have had it *in their power* to commit this second fraud on the spinners, therefore the trustee must be adjudged to have title. If the petitioner's argument is sound, it means that a trustee in bankruptcy takes title to all property which the bankrupt could *by any dishonest means* have conveyed. If, for example, a bankrupt had temporary custody of a third person's property and such *indicia* of title that a conveyance by the bankrupt to a *bona fide* purchaser would have been binding upon such third person, does the trustee in bankruptcy take title to that property simply because the bankrupt might, if he had chosen, have committed a dishonest act? It is submitted that the statute does not give the trustee title to all property which could *by means of a fraud* have been conveyed by the bankrupts. It means that the trustee gets title to property of which the bankrupt had the *lawful* power of disposition. It seems grotesque for a trustee in bankruptcy to say that because the bankrupts may have had it in their power to commit a second fraud, therefore the case must be treated as though they had committed it and the fruits of it be awarded to the trustee.

The answer to the petitioner's argument is that the *wrongful* holder of a bill of lading has no right, as against the true owner, to control the delivery or destination of goods in the hands of a carrier.

It is pointed out (Brief, p. 53) that Knight, Yancey & Company did not send the genuine bills

of lading to the spinners. Of course they did not. To do so would have been simply to advertise their fraud. But they did do the equivalent—they suppressed the genuine bills.

The petitioner says that the spinners could not have secured the cotton from the carrier on the forged bills. Why not? That very thing had been done probably a thousand times before in the course of Knight's business. But suppose that the carrier had objected to delivering the goods and that the bankrupts had presented the genuine bills and demanded the cotton, the carrier would simply have filed a bill of interpleader and thus raised exactly the question now before the Court. It is safe to say that under these circumstances no court in the world would have awarded the cotton to the bankrupts. And the petitioner has wholly failed to show that he has greater rights than they would have had.

2. *Delay in Shipment—Insurance.*

The petitioner argues that no title passed because the goods were not actually shipped at the time specified in the contracts and because, as he says, they were uninsured. This argument has already been answered in the discussion as to estoppel (pp. 41 *et seq, supra*). The petitioner is estopped to deny that the goods were shipped at the time represented in the forged bills, and is also estopped to deny that they were insured, as represented in the insurance certificates. Moreover, the argument is repugnant to fundamental principles of justice.

In Broom, Legal Maxims, 8 ed., pp. 234, 235, it is said:

"It is contrary to justice that a party should avoid his own contract by his own wrong. Accordingly, 'in a long series of decisions, the Courts have construed clauses of forfeiture in leases, declaring in terms, however clear and strong, that they shall be void on breach of conditions by the lessees, to mean that they shall be voidable only at the option of the lessors. The same rule of construction has been applied to other contracts, where a party bound by a condition has sought to take advantage of his own breach of it to annul the contract.' [Davenport *v.* The Queen, L. R. 3 Ap. Cas. 128, 129]. * * * It is moreover a sound principle that he who prevents a thing from being done shall not avail himself of the non-performance he has occasioned."

At pp. 239, 240, the same writer says:

"The author of wrong, who has put a person in a position in which he had no right to put him, shall not take advantage of his own illegal act or, in other words, shall not avail himself of his own wrong. * * * A wrongful or fraudulent act shall not be allowed to conduce to the advantage of the party who committed it."

In Gumbel *v.* Pitkin, 124 U. S. 131, this Court said at p. 147:

"It is a cardinal maxim that no one shall be allowed in a court of justice to take advantage of his own wrong. No more flagrant instance of a violation of that fundamental principle can be conceived than that which is furnished by the circumstances of the present case. The very ground, and the sole ground, on which relief is denied to the plaintiff in error is that he has been prevented from asserting it legally by the violence and wrong of those who now deny it."

To the same effect:

Risley *v.* Smith, 64 N. Y., at 582.
Gallagher *v.* Nichols, 60 N. Y. 438, at 448.
Doe *v.* Bancks, 4 B. & A., at 406.

Other answers to the petitioner's argument are plain. Title passed on shipment. Doubtless, on learning that the shipment was late, the vendees could have refused the goods and could not have been *compelled to take them;* but there is not the slightest authority for the proposition that they were *compelled to refuse them.* The right to rescind is a right given to the buyer because of the seller's wrong-doing; it cannot be exercised *by the seller* in his own favor and against the buyer's wish. That would be to double the wrong to the buyer. It is bad enough to be cheated and to have goods for which one has paid, fraudulently held back for two months; but to have that very fraudulent delay made an excuse for depriving the buyer of the goods altogether, would be illogical and absurd.

The law is perfectly plain. Such covenants, warranties, or conditions, whichever they may be called, as the stipulation here for January-February shipment, are obviously for the exclusive benefit of the buyer. If they are broken, he may in a proper case rescind title and return the goods, but the case has yet to be decided which holds that he *must* rescind. A seller who has failed to keep his contract has never *on that ground* been allowed to retake the goods from a buyer who is willing to overlook the breach and keep them. The trial Court met the argument completely in its opinion (Record, p. 40):

"The stipulations as to time of delivery, time and manner of payment, *et cetera*, were merely accidental, and the parties for whose benefit they were inserted could waive them without affecting the contract."

Williston states the law correctly and conclusively as follows (Sales, p. 242):

"If a condition in the contract is wholly for the benefit of one party thereto, he may waive it. *The other party cannot insist that the condition shall be performed.* * * * Wherever the non-performance of a condition would justify a party to the contract, or sale refusing to proceed further with the transaction his continuing to perform or to receive performance with knowledge of the breach of condition will be a waiver of the condition."

In Smith *v.* Peyrot, 201 N. Y. 210, the Court said, p. 214:

"It is a familiar principle that one cannot avail himself of the failure to observe a condition precedent, who has himself occasioned the non-performance."

So in Neill *v.* Whitworth, 18 Com. B. N. S., 435, at 442, the Court said:

"I am of opinion that the clause in question constitutes an independent stipulation introduced solely for the benefit of the vendors, and therefore is matter upon which the vendees cannot rely as amounting to a condition precedent."

The case of Redlands Orange Growers *v.* Gorman, 76 Mo. App. 184, also illustrates the buyer's right to take the goods. At page 190 the Court said:

"Where time is made the essence of the contract, delay beyond the stipulated time in the shipment or delivery of goods *does not preclude the vendee from accepting them.*"

This case was affirmed and the opinion quoted above approved in 160 Mo., 203; 54 L. R. A., 718.

To the same effect see—

Day *v.* Pool, 52 N. Y., 416;
54 L. R. A., 718, note;
7 L. R. A. N. S., 1114 note.

In Arkwright Mills *v.* Aultman Co., 145 Fed. 783, the Court said, at 785:

"It should be borne in mind that the purchaser of the boilers had an option upon a breach of the warranty to return the boilers or to retain them and to claim as damages the difference between the value of the boilers actually received and the value of the boilers contracted for. It was obvious in this case that the plaintiff had elected to retain the boilers and to seek compensation in damages for breach of warranty."

It is not to be forgotten that the spinners have definitely declared their position. They bonded the cotton as soon as it was stopped by the District Court (see intervening petition), and have formally appeared and claimed ownership. They also received the cotton and paid the ocean freight on it (see stipulation as to value of cotton dated May 24, 1911; Record p. 152). This was after they knew of the delay. They could not now disaffirm the transaction if they wanted to; on the contrary, they have declared their acceptance of the cotton in the most solemn manner possible.

But it is argued that because the provision for January-February shipment was broken by failure to ship in those months, the contract was at an end for every purpose except suits for damages; that new contracts were necessary to effect any transfer of title to the goods, and that title could not pass under the original agreements of purchase. This is not the law. The goods shipped were exactly what had been ordered; they were sent by the designated carrier, and in the designated manner. As was said in Lyon *v.* Bertram, 20 How., 149;

"The case clearly does not belong to that class in which the subject matter of the contract was of a nature wholly different from that concerning which the parties to the contract made their engagements."

The point was squarely decided in Bacon *v.* Cobb, 45 Ill., 47 at 56, 57, where it was held that in spite of a breach as to time of performance, title passed under the original contract.

In Williston, Sales p. 1085, it is said:

"It is generally said that a defrauded party must elect whether he will affirm the fraudulent transaction or rescind it. But a transaction though induced by fraud is not on that account void, it is only voidable; consequently if nothing is done the transaction is not avoided, and the rights of the parties will be fixed *by the agreement which they made* without any manifestation of election."

The Supreme Court of Alabama expressed the law accurately in the case of Eastern Granite Roofing Co. *v.* Chapman & Co., 140 Ala. 440, at 443, where it said:

"The mere breach of warranty would not prevent the title to the property from vesting in the purchaser *by virtue of the contract of purchase.*"

The breach in that case was one as to the quality of the goods.

In Foley *v.* Felrath, 98 Ala. 176, at 180, the same Court said, in speaking of a similar situation:

"Title passes subject to the right to rescind and return, which is in effect a right to resell to his vendor."

A case directly in point is Andrews *v.* Schreiber, 93 Fed. 367, where wheat of a specified grade was to be sold and to be shipped by carrier to the buyer. A portion of it fell below grade. It was held that none the less title passed, and that the grading of the property and the acceptance by the purchaser of the inferior grade was not "essential to the delivery of the property and the passing of the ownership to the purchaser" (p. 373). In other words, even though the vendor had violated his contract by shipping inferior goods, still title passed *on shipment,* subject to the vendor's lien; and, as soon as that was divested by payment of the price, *complete title was in the purchasers, even though they did not yet know that the grade was deficient.* This decision was affirmed on appeal in 101 Fed. 763. The Circuit Court of Appeals said, p. 766:

"The contract contained an implied warranty that the wheat delivered to fulfil it should be No. 2 hard, and, when some of it proved to be of an inferior grade, the *vendees had the option to return it* and to sue the vendor for the purchase

price they had paid or *to retain it*, and recover the difference between its actual value and the value it would have had if it had filled the warranty. * * * The delivery was of wheat to fulfil *that contract.* The contract, the delivery of and the payment for each carload of wheat were made, and *title to it passed to the purchaser before the inspection and weighing were or could be had,* and the conclusion is irresistible that *they neither conditioned the sale nor the identity of the property sold.*"

See too Jeffrey Mfg. Co. *v.* Central Coal & Iron Co., 93 Fed. 408.

In Mirabita *v.* Imperial Ottoman Bank, L. R. 3 Ex. Div. 164, at 169, 170,—a case where bills of lading were taken to the shipper's order, and where it was found, as a fact, that the intention was for title to pass on shipment, subject to a lien for the price,—the Court said:

"It is found in this case that as far as intention went the property was to be in the plaintiff on shipment. If the plaintiff had paid and the defendants had accepted the amount of the bill of exchange, it cannot be doubted that the property would have vested in the plaintiff. Why? Not by any delivery. None might have been made; *the defendants might have wrongfully withheld the bills of lading. The property would have vested by virtue of the original contract of sale.*"

In Donaldson *v.* Farwell, 93 U. S., 631, the Supreme Court said:

"Here the defrauded vendors exercised the right of rescission shortly after the sale and as soon as they obtained knowledge of the fraud; if, therefore, this controversy were between Mann (the bankrupt) and them, it is clear that he would not be entitled to recover. * * * Only *the*

*defeasible title of the latter* (the bankrupt) to the goods in controversy vested in the assignee."

In the Donaldson case, the Court would hardly have listened to the proposition that, because the defrauded party could rescind as against the trustee, therefore the trustee might rescind as against the defrauded party and keep the money as well.

Indeed, under circumstances like the present, where the goods have been paid for, the assent of a vendee to take title is assumed as matter of law.

In Grove *v.* Brien, 8 How, 429, this Court said:

"In the absence of all evidence to the contrary in case of an absolute assignment of property by a debtor to his creditor for the purpose of securing a pre-existing debt, an assent will be presumed on account of the benefit that he is to derive from it. This principle was recognized and applied by this Court in the case of Tompkins *v.* Wheeler, 16 Peters, 106, and had been before in Brooks *v.* Marbury, 11 Wheat. 96. No expression of assent, the Court say, of the person for whose benefit the assignment is made, is necessary to the vesting the title; as the creditor is rarely unwilling to receive his debt from any hand that will pay him."

An elaborate and highly technical argument is made by the petitioner to show that this doctrine has no application. But it is plainly a case in which to apply it. When a man agrees to buy certain articles and actually pays for them, it is no very violent assumption to say that he will take them when they are sent to him. If the shipment is not in precise accordance with the contract, he has a perfect remedy in his right to

rescind title. The petitioner's fears lest the application of the doctrine here may deprive the spinners of claims against the estate or force upon them some burdensome objection, are unfounded.

The arguments just made apply equally to the failure (if there was one) to insure the goods. As a matter of fact it is, however, believed that the goods were insured. The certificates of insurance which are in evidence show that Knight, Yancey & Company had paid premiums to insure certain lots of cotton marked with certain marks, by the Southern Railway from Selma and Decatur to New Orleans, and thence by the Cotoniera Line to Genoa. There is no statement in the certificate as to when the goods were shipped, or that they had been shipped at the time the certificate was issued. There is nothing whatever in the certificate, or elsewhere in evidence, to indicate that the insurance would be avoided if the goods had not in fact been shipped at the time when the certificate was issued, or within any particular length of time thereafter. It is not perceived on what ground the underwriters could refuse payment for the loss of such goods so marked, and shipped by the carriers mentioned.

It makes no difference that the spinners did not know of the fraud until after the bankruptcy. Title passed on shipment, irrespective of their knowledge. They might, if they desired, rescind; and this right they could have exercised after bankruptcy. Liens may be foreclosed, options exercised, mistaken contracts reformed and fraudulent transactions avoided quite irrespective of bankruptcy, because, as regards such matters, the trustee takes only the bankrupt's rights.

The right to rescind title and return the goods naturally could not be exercised by the spinners

until they knew that the shipment had not been made in the stipulated months, and that, therefore, they had the right to rescind and reject the goods. If they had desired to do so, they would then have been entitled to rescind as against the trustee in bankruptcy. Their right to do so was not lost by the appointment of the trustee, for he took subject to such rights. Similarly, where, as here, they decided, the moment they learned the facts, to keep the goods, their right to do so was not affected by the bankruptcy. Title passed to them at shipment, and could only be divested, if they chose to divest it, by affirmative action on their part. The trustee took subject to the titles and rights already vested in the spinners by the acts of the bankrupts.

In Remington, Bankruptcy, § 1169 it is said that the right to rescind a sale for fraudulent misrepresentation is not affected by the bankruptcy of the wrongdoer. It follows that the right to allow the sale to stand is equally unaffected.

Title passed on shipment, subject to the vendee's option of rescission. And beyond all this, there remains the fact that the trustee is estopped to assert that the provisions of the contracts as to shipment were not complied with.

*3. The Petitioner's Authorities.*

The petitioner has cited numerous cases for the proposition that title to goods will not pass where there has been a breach of a warranty or condition of the sale. Without exception, however, these are cases where it is the *aggrieved party* who has set up the default. Of course the inapplicability of such cases is obvious without argu-

ment. The petitioner has not cited one case, and he cannot cite one, where the party guilty of the breach has been allowed to set up such breach for his own advantage. The cases in question do not in a single instance support the proposition that a vendor may set up in his own favor his own breach of a warranty or condition designed for the benefit of the vendee. The following cases, with the pages of the petitioner's brief at which they are cited, are inapplicable on this ground:

| | Cited in brief at page |
|---|---|
| Norrington *v.* Wright, 115 U. S. 188.. | 28, 63 |
| Filley *v.* Pope, 115 U. S. 213..... | 28 |
| Ashmore *v.* Cox, L. R. (1899) 1 Q. B. 436 ..... | 28 |
| Henderson *v.* McFadden, 112 Fed. Rep. 389 ..... | 28 |
| Alsberg *v.* Latta, 30 Ia. 442..... | 28, 59 |
| Soper *v.* Creighton, 93 Me. 564..... | 28 |
| Jones *v.* Schneider, 22 Minn. 279..... | 30 |
| Williston, Sales p. 400..... .. | 57 |
| Mechem, Sales, Sec. 746..... | 63 |

Nor is the petitioner's case aided by such authorities as the St. Jose Indiano, 1 Wheat. 208, Turner *v.* Liverpool Dock Trustees, 6 Exc. 543, and others cited at pp. 35, 36, and 51-55 of his brief, to the effect that ordinarily, and in the absence of explanatory evidence, title to goods consigned to shipper's order, especially when the price is unpaid, remains in the shipper as long as he holds the bill of lading. That proposition is conceded. There is nothing in the cases cited which even remotely resembles that at bar.

There are a considerable number of other cases cited by the petitioner which protect the rights of a third person who is a bona fide purchaser, on facts, however, not like those at bar. The inapplicability of such cases to the present is obvious, since in the present case the rights of no third person are involved. The following cases which the petitioner cites (Brief, pp. 35, 36, 53) are of this character.

Wait *v.* Baker, 2 Exc. 1;

Gabarron *v.* Kreeft, L. R. 10 Exc. 274, (where the shipper's intent was found to be to pass title to an innocent third party);

Ellershaw *v.* Magniac, 6 Exc. 570, (where linseed was ordered and wheat was shipped and where an innocent third person's rights were involved);

Parmelee *v.* Simpson, 5 Wall 81 (Brief, pp. 39, 40, 66, 68).

Lack of space forbids review of all of the very numerous authorities referred to by the petitioner. In addition to those mentioned above, a few of the more important will be briefly commented upon:

In Sneathen *v.* Grubbs, 88 Pa. 147, (Brief pp. 28, 57), the contract provided that the seller should carry the coal in barges to a certain point and there deliver it. Naturally it was held that title had not passed until the seller had carried it to the place in question.

In the Belding-Hall Mfg. case, 175 Fed. Rep., 335, (Brief, pp. 30, 32, 72), the seller was to load the goods on cars, and delivery was then to take place. The Court rightly said that until this was done, there was no delivery. It was, however, found that the original contract had been modified by waiving the loading, and title was therefore held to have passed.

Both these cases illustrate the obvious proposition that title does not pass until the act of delivery specified in the contract has been performed. But in the case at bar that act,—*i. e.*, shipment by carrier,—had been done. The cases of Block *v.* Shaw, 95 S. W. 806 (Brief, pp. 44, 76), and Stanford *v.* McGill, 72 N. W. 938 (Brief, pp. 44, 78), are inapplicable for the same reason.

Reliance seems to be placed on the case of Dows *v.* National Exchange Bank, 91 U. S., 618, (Brief, pp. 35, 52, 54). There a shipper attached to bills of lading drafts for the purchase price of the goods, and the Exchange Bank discounted these drafts with the bills attached, thereby obtaining a banker's lien thereon, and gave orders not to deliver the grain until payment. This Court held that the bank became possessed of a special property in the goods, which it was entitled to retain until payment.

*Under these circumstances,* the Court said that "*these bills of lading unexplained* are almost conclusive proof" of an intention to reserve the *jus disponendi.* Of course they were. The drafts were unpaid, and the bank had expressly stated that it would not permit delivery until payment. It held the bills of lading to secure the payment, and no Court could have held that, so long as it re-

mained unpaid, its security was invalid. Every line of the Court's opinion shows that it is speaking of a case where the purchase price has not been paid, and is passing on the effect of the bills of lading in the light of that fact. The Court had no intention of upsetting the well-settled rule, declared by many Courts, including itself, that the form of the bill of lading is only one piece of evidence as to title. Indeed the Court in the Dows case said, at p. 634, in a passage not quoted by the petitioners:

"We agree that, where there are circumstances pointing both ways, some indicating an intent to pass the ownership immediately, notwithstanding the bill of lading—in other words, where there is anything to rebut the effect of the bill—it becomes a question for the jury whether the property has passed."

In Hoover vs. Maher, 53 N. W. Rep. 646, (Brief, pp. 28, 58), goods were ordered for shipment on a specified day. The vendor shipped them before the date, but instead of shipping to the vendee he shipped to a third person *with instructions to hold the goods until the specified date,* and then to deliver. The vendee stated that he did not want the goods in advance of the specified date. He had not paid for them. They were destroyed by fire while in the hands of the vendor's bailee, and, of course, it was held that title had not passed. The Court, however, remarked that "the defendant might waive compliance with the condition."

In Alsberg *v.* Latta, 30 Ia. 442, (Brief, pp. 28, 59), the buyer refused the goods because of the seller's breach of his obligation. Moreover, the goods were not even the ones which the purchaser had ordered.

In the Prize Cases (The *Frances*, the *Merrimack*, and the *Venus*, 8 Cranch), (Brief, pp. 31, 63), there appear to have been no contracts of sale and no authority from the vendees to make the shipment except in the cases of McKean and Woodland and of W. and J. Wilkins, treated at pages 327 and 329, where title was held to have passed.

In McDonald *v.* Pearre Bros., 62 S. E. 830 (Brief, pp. 29, 61), a seller who had contracted to insure failed to do so, and was in consequence obliged to pay the loss caused by the destruction of the goods. This, again, was not a case where the person guilty of the wrong was seeking to take advantage of it, but exactly the reverse.

In Low *v.* Pew, 108 Mass. 349 (Brief, pp. 32, 73), there was an agreement to sell fish to be afterwards caught. There was a specific provision for delivery to the vendee when the ship returned from the voyage. It was held that title to the fish did not pass, as against the trustee, because bankruptcy intervened before the specified delivery had been made. Had the fish, after being caught, been shipped by carrier to the vendee prior to the bankruptcy, or appropriated to an outstanding bill of lading for which the vendee had paid, unquestionably the vendee would have been held entitled to them.

Bryans *v.* Nix, 4 M. & W. 794, is referred to (Brief, p. 75). There a fraudulent shipping document was negotiated, but the goods were never shipped to cover it, as they were in the case at bar. The Court, however, said:

"If indeed after the 31st of January these oats so prepared, or any other like quantity had been

put on board to the amount of 530 barrels or less for the purpose of fulfilling the contract, and received by the master as such before any new title to these oats had been acquired by a third person, we should have probably held that the property in these oats passed to the plaintiffs."

In other words the Court in Bryans *v.* Nix would have held that title passed by subsequent appropriation if there had in that case been any appropriation. The case is really an authority in favor of the respondents.

In Fourth St. Nat. Bank *vs.* Milbourne Co.'s Trustee, 172 Fed. Rep. 177 (Brief, pp. 36, 87), there was an attempted pledge, invalid under State law, and it was held (Buffington, J., dissenting) that it was consequently invalid as against the trustee. This simply applies the principle of the Knapp and Security Warehousing cases.

It is impossible to comment specifically on each of the authorities cited by the petitioner; but it may be said once more than under none of them would the bankrupts have title to the goods in question as against the spinners, and under none of them does the trustee occupy any better position.

## FIFTH.

## Preference.

The petitioner's brief speaks of preferences and suggests that the spinners are receiving an unlawful preference. This action is at law, to assert a title; not in equity, to avoid one. There

is neither pleading nor proof in the case regarding the subject of preference; no issue is raised as to it, and no discussion of the subject is relevant. It has already been pointed out (p. 12, *supra*) that counsel for the petitioner in open court, formally disclaimed any contention of preference (Record, p. 16); and there is no assignment of error regarding it.

Even if the question were raised, the trustee would fail, for the spinners had not the remotest idea nor the slightest ground for believing that Knight was insolvent, or that they were receiving a preference. The transaction was not a sale on credit, creating the relation of debtor and creditor. The spinners never had the slightest idea of extending credit to Knight. They took forged bills of lading, believing that they represented cotton. It was a sale for present consideration, and none the less so because Knight fraudulently delayed delivery. There is no possibility of calling the transaction a preference.

The petitioner has taken the liberty of stating to the Court in his petition (p. 12) that there are other persons, similarly defrauded by Knight, who have not been made good by subsequent shipments. While there is no evidence of this in the record, the respondents do not object to the statement, provided that the remainder of the relevant facts are also stated—namely, that Knight, Yancey & Company had been for four years in the habit of perpetrating such frauds and covering them by subsequent shipments, just as in the present case; that the cotton was invariably obtained by the purchaser on the forged bills; and that the genuine bills were invariably suppressed by Knight. While none of these facts appear on

the record, still, if the petitioner is to state that part of the facts not in evidence which he thinks favorable to his case, the respondents are entitled to state the remaining facts which the petitioner has omitted; and these facts show that, in shipping the cotton in question, Knight, Yancey & Company were not attempting to prefer these particular spinners, but were merely performing their contracts in their regular course of business.

Much is said about equality among the creditors, but this applies only to creditors similarly situated. Knight, Yancey & Co. shipped to the spinners the cotton to which the latter were entitled, and the spinners are absolutely justified in standing on their title and in holding the trustee to the estoppel. If Knight, Yancey & Co. failed to ship cotton to which others were entitled, that fact does not affect the rights of the spinners. If the trustee's argument is sound, he could deprive of their property all purchasers from Knight, Yancey & Co. who had obtained cotton under similar circumstances within four months of the bankruptcy. It is quite misleading to argue that, because the bankrupts have failed to perform some of their contracts, therefore all other persons whose contracts they have performed are violating the Bankruptcy Act.

The petitioner's whole case rests upon the proposition that, because the delivery to the carrier was made under fraudulent circumstances, that very fraud puts him in a better position than he would otherwise have occupied, and entitles him to claim, as against the defrauded buyers, that delivery to the carrier did not pass title. Such a claim is opposed, not only to all principles of common sense and justice, but to all the authori-

ties in the books. It is an extraordinary thing for a trustee, the officer of a court of equity, to ask this Court in effect to aid him in consummating the fraud which the bankrupts undertook. Even they intended that the spinners should pay for the cotton only once. The trustee wants them to do so twice.

The petitioner is practically claiming that the fraud is *an asset in his hands,* entitling him to rights which would not otherwise exist. Any such idea was effectually disposed of by this Court in Zartman *v.* First National Bank, 216 U. S. 134, where action was brought to reform a contract as against the trustee. The Court said:

"The position of the trustee in bankruptcy seems to be that the *mistake* made by Bacon in dictating or writing out the contract between himself and the Waterloo Bank *'is an asset in his hands* as part of the estate of the bankrupt,' but we cannot agree to that. * * * The rule applicable to this and all similar cases is that the trustee takes the property of the bankrupt not as an innocent purchaser but as the debtor had it at the time of the petition, subject to all valid claims, liens and equities."

The courts will never look with favor upon the attempt of a trustee in bankruptcy to reap the fruits of the bankrupt's wrongdoing. In Bloomingdale *v.* Empire Rubber Co., 114 Fed. Rep. 1016, the Court said:

"The whole transaction was a palpable fraud by which the bankrupt's creditors may not and should not profit."

## SIXTH.

### Italian and French Decisions.

It may also be worth while to call the attention of the Court to the decision of the Tribunale Civile of Genoa, handed down on May 13, 1911, and since affirmed on appeal, in a case identical with that at bar. By the agreed facts (Record, p. 48) it appears that 89 bales of the cotton marked TSLL went forward to Genoa on the S.S. *Sicania*. The S.S. *Kronborg* also carried a large quantity of other cotton shipped under the same circumstances. When these vessels arrived, the trustee in bankruptcy claimed this cotton and the spinners bonded it just as in the present case. When the action brought to try title came on, the Italian court held title to be in the spinners, upon reasoning very like that of the Circuit Court in the present case. It is the understanding of counsel that the French courts have decided a similar suit in the same way. The fact that these decisions are by the courts of different countries makes them none the less authorities for the respondents. The general principles of sales and of mercantile law apply throughout the civilized world. It would certainly be unfortunate for the mercantile community if the ownership of property under such circumstances depended simply upon the forum where the litigation took place.

## SEVENTH.

### Conclusion.

To summarize the respondents' position, they claim:

(1) That the shipment of the cotton was, as the Circuit Court found, an appropriation to the contracts. Delivery to the carrier was to be delivery to the buyer. When delivery was accordingly made to the carrier, *under these contracts* and with intent to fill these contracts, title passed.

(2) The petitioner cannot set up delay in shipment or the alleged failure to insure, for four different reasons:

(a) These provisions were solely for the benefit of the vendees and therefore the vendors cannot rely upon them.

(b) The vendors cannot rely upon their own wrongdoing.

(c) The vendors are estopped to deny that the goods were shipped at the proper time and covered by insurance.

(d) The bonding of the cotton by the spinners and the payment of ocean freight on it and acceptance of it, amounted to a waiver of the provisions as to insurance and date of shipment. The original contracts remained otherwise unaltered. It is not, however, necessary to rely upon waiver, for the trustee cannot be heard to assert the deficiencies to which the waiver would be applicable.

(3) The petitioner is estopped to deny that the forged bills of lading were genuine and that the cotton in controversy was shipped under them. He is estopped, after having by false representations sold to the spinners the forged bills, to claim title in himself under the duplicate genuine bills.

(4) The petitioner is further estopped to claim title to the cotton in dispute because by the forged bills of lading and accompanying documents he represented that he had possession of and title to that cotton, and on faith of that representation obtained the spinners' money.

(5) The petitioner claims in his pleadings only the rights of the bankrupt, and those are, even apart from the form of the pleadings, the only right which the law gives him in a case like the present.

The present case is unusual solely because of the nature of the fraud attempted. The questions of law involved are not of an unusual character. It is plain that the bankrupts could not retake the cotton as against the spinners; and the trustee, standing in their shoes, has no greater rights. The decision below was consonant with justice and with well settled principles of law. There is nothing in the case which requires the extraordinary remedy of review by certiorari.

New York, December 11, 1912.

EVERETT P. WHEELER,
JOHN W. GRIFFIN,
Counsel for Respondents,
27 William St.,
New York City.

# Supreme Court of the United States

OCTOBER TERM, 1912.

No. 395

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WILLIAM S. LOW, U.S., Trustee in Bankruptcy of Knight, Dewey & Co.,

*Plaintiff in Error*

*against*

THEODORE NEWMAN & SON, et al.,

*Defendants in Error*

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## Motion to Dismiss for lack of jurisdiction or to Affirm Judgment below, and Brief in Support of Motion.

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ROBERT E. WELSH,
JOHN V. BROWN,
*Counsel for Defendants in Error*

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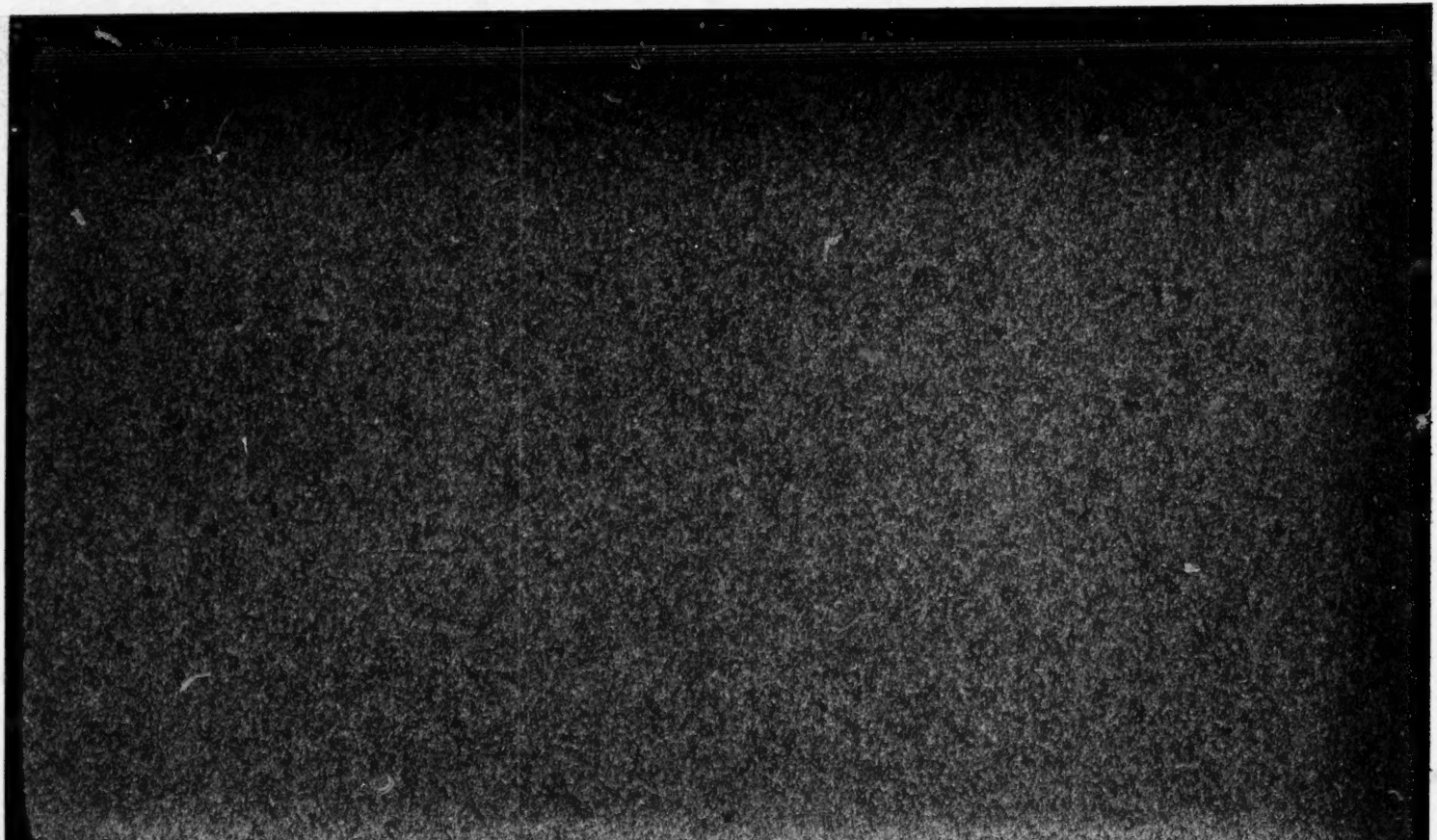
R. H. Woods, Printer, Rear Corner Court, Troy, N.Y.



# INDEX.


PAGE

Motion to Dismiss or Affirm..... 1
Notice of Motion..... 2

Brief in Support of Motion.

Questions Presented..... 4
Statement of Facts..... 5
Assignments of Error..... 10

Argument on Motion to Dismiss..... 11

Points:
I. The Circuit Court's Jurisdiction was based on Diversity of Citizenship..... 11

II. Diversity of Citizenship was the only basis for the Jurisdiction of the Circuit Court..... 12
*1. The fact that the plaintiff is a trustee in bankruptcy does not give jurisdiction to the Federal Courts* ..... 12
*2. No Federal question was alleged or was involved in the Circuit Court*..... 12

PAGE

*3. Ancillary Jurisdiction*..... 24
*4. No Jurisdiction by Consent*..... 30

---

ARGUMENT ON MOTION TO AFFIRM..... 38
FINDINGS OF FACT..... 38

POINTS:

I. THE TRUSTEE STANDS IN THE SHOES OF KNIGHT, YANCEY & CO., AND HAS NO GREATER RIGHTS THAN THEY HAD PRIOR TO THE ADJUDICATION ..... 39
II. THE SHIPMENT OF THE COTTON WAS AN APPROPRIATION OF IT TO THE CONTRACTS OF PURCHASE AND TO THE FIRST SET OF BILLS OF LADING, AND TITLE PASSED TO THE SP NNERS IMMEDIATELY UPON SHIPMENT. 43
III. ESTOPPEL ..... 46
IV. THE TRUSTEE'S ARGUMENT..... 49
V. PREFERENCE ..... 54
VI. CONCLUSION ..... 55

## Table of Cases.

PAGE

Aldine Trust Co. *v.* Smith, 182 Fed. Rep., 449 ..... 40, 48
Alexander *v.* Machan, 147 U. S., 71 ..... 39
Andrews *v.* Schreiber, 93 Fed. Rep., 367; 101 Fed. Rep., 763 ..... 52, 53
Arkwright Mills *v.* Aultman Co., 145 Fed. Rep., 783 ..... 52
Avery *v.* Popper, 179 U. S., 305 ..... 21
Babbitt *v.* Dutcher, 216 U. S., 102 ..... 25
Bacon *v.* Cobb, 45 Ill., 47 ..... 53
Bardes *v.* First National Bank, 178 U. S., 524 ..... 12, 32, 35, 36
Barnes *v.* Pampel, 192 Fed. Rep., 525 ..... 27
Belding-Hall Mfg. Co. *v.* Mercer-Ferdon Co., 175 Fed. Rep., 335 ..... 54
Blake *v.* Openhym, 216 U. S., 322 ..... 17
Bonin *v.* Gulf Co., 198 U. S., 115 ..... 23
Borgmeyer *v.* Idler, 159 U. S., 408 ..... 13
Bowden Bros. *v.* Little, 4 Comm., 1364 ..... 44
Bradford *v.* Marbury, 12 Ala., 520 ..... 50
Carlos F. Roses, 177 U. S., 655 ..... 50
Chapman *v.* Bowen, 207 U. S., 89 ..... 17, 20
Colorado Cent. Cons. Min. Co. *v.* Turck, 150 U. S., 138 ..... 13
Compton *v.* Jesup, 68 Fed. Rep., 263 ..... 24
Conard *v.* Atlantic Ins. Co., 1 Peters, 386 .. 49
Cramer *v.* Wilson, 195 U. S., 408 ..... 17
Crawford *v.* Kirksey, 55 Ala., 282 ..... 42
Crescent Live Stock Co. *v.* Butchers' Union, 120 U. S., 141 ..... 22
Dooley *v.* Pease, 180 U. S., 126 ..... 39
Dows *v.* Nat. Exch. Bank, 91 U. S., 618 .... 50
Durham, In re, 114 Fed. Rep., 750 ..... 35

PAGE.

Eastern Granite Roofing Co. *v.* Chapman, 140 Ala., 440..... 53
Farrell, In re, 176 Fed. Rep., 505..... 26
Faulks *v.* Kamp, 3 Fed. Rep., 898..... 46
Files *v.* Davis, 118 Fed. Rep., 465..... 20
First National Bank *v.* Chicago Title & Tr. Co., 198 U. S., 280..... 27
Foley *v.* Felrath, 98 Ala., 176..... 53
Frank *v.* Vollkommer, 205 U. S., 521..... 22
Gill *v.* Oliver, 11 How., 529..... 23
Gregory *v.* Van Ee, 160 U. S., 643..... 24, 29
Grove *v.* Brien, 8 How., 429..... 53
Gumbel *v.* Pitkin, 124 U. S., 131..... 51
Harris *v.* Truman, L. R. 9 Q. B. D., 264... 40
Hentz *v.* The *Idaho*, 93 U. S., 575.....46, 48, 50
Hewit *v.* Berlin Machine Works, 194 U. S., 296 ..... 27, 40
Holden *v.* Stratton, 191 U. S., 115..... 28
Howard *v.* United States, 184 U. S., 676.... 19
Howell *v.* Carden, 99 Ala., 100..... 42
*Idaho*, see Hentz *v.* The *Idaho*.
Jaquith *v.* Rowley, 188 U. S., 620..... 35
Jones, ex parte, 164 U. S., 691..... 14
Joyce *v.* Swann, 17 C. B. N. S., 84..... 50
Kelly *v.* Scott, 49 N. Y., 595..... 47
Kimball *v.* Blaisdell, 5 N. H., 533..... 41
Lamb *v.* Ewing, 54 Fed. Rep., 269..... 25
Layson *v.* Cooper, 174 Mo., 210..... 47
Leonard *v.* Vicksburg, &c. R. R. Co., 198 U. S., 416..... 18
Leslie *v.* Brown, 90 Fed. Rep., 171..... 20
Louisville Trust Co. *v.* Comingor, 184 U. S., 18 ..... 35
McKay *v.* Aldus, Re, 1 Low., 345..... 40, 48
Mayer *v.* Clark, 40 Ala., 259..... 42

PAGE.

Mee *v.* McNider, 109 N. Y., 500 ..... 44
Merchants Mut. Ins. Co. *v.* Allen, 121 U. S., 67 ..... 39
Metcalf *v.* City of Watertown, 128 U. S., 586 ..... 22
Morrison *v.* Caldwell, 17 Am. Dec., 84 ..... 41
Mueller, In re, 135 Fed. Rep., 711 ..... 26
Pease Car, &c. Works, In re, 134 Fed. Rep., 919 ..... 48
Pope *v.* Louisville, &c. Ry. Co., 173 U. S., 573 ..... 20, 23, 24, 28
Press Publ. Co. *v.* Monroe, 164 U. S., 105 ... 13, 17
Provident Sav. Society *v.* Ford, 114 U. S., 635 ..... 22
Redlands Orange Growers *v.* Gorman, 76 Mo. App. 184; 160 Mo., 203 ..... 52
Risley *v.* Smith, 64 N. Y., 576 ..... 51
Rouse *v.* Letcher, 156 U. S., 47 ..... 24, 29
Scott *v.* Kelly, 22 Wall., 57 ..... 17, 18
Sherman *v.* Champlain Tr. Co., 31 Vt., 162 .. 47
Smith *v.* Peyrot, 201 N. Y., 210 ..... 52
Sneathen *v.* Grubbs, 88 Pa., 147 ..... 54
Spencer *v.* Duplan Silk Co., 191 U. S., 526 ..... 12, 15, 16, 30
Spies, ex parte, 123 U. S., 131 ..... 19
Taylor *v.* Agric. Assn., 68 Ala., 228 ..... 41
Tefft *v.* Munson, 57 N. Y., 97 ..... 41
Tregelles *v.* Sewell, 7 Hurls. & N., 574 .... 44
Tullock *v.* Mulvane, 184 U. S., 497 ..... 20, 21
Tyng *v.* Grinnell, 92 U. S., 467 ..... 39
Ullman *v.* Myrick, 93 Ala., 532 ..... 42
United States *v.* Andrews, 207 U. S., 229 .. 43
Yeatman *v.* New Orleans Sav. Inst., 95 U. S., 764 ..... 40
York Mfg. Co. *v.* Cassell, 201 U. S., 344 .... 41
Zartman *v.* First Nat. Bank, 216 U. S., 134 .. 40, 56

# Supreme Court of the United States.

| | |
|---|---|
| WILLIAM S. LOVELL, Trustee in Bankruptcy of Knight, Yancey & Company, Plaintiff in Error, *against* ISIDORE NEWMAN & SON, *et al*, Defendants in Error. | October Term, 1912. No. 593. |

**Motion to dismiss writ of error or to affirm the judgment below.**

And now come Isidore Newman & Son, Cotonificio Cantoni, Cotonificio Furter, Manifattura Tosi, Gianoli Brothers, and A. Bernocchi Brothers, by their counsel appearing in their behalf, and move this Court:

FIRST: To dismiss the writ of error herein on the ground that this Court is without jurisdiction of the cause sought to be reviewed by said writ of error.

SECOND: To affirm the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, which is sought to be reviewed by the writ of error herein, on the grounds that the rulings, decision and judgment of said Circuit Court of Appeals are obviously correct; that it is manifest that the writ of error was taken for delay only: and that the questions on which the decision of the cause depends are so frivolous as not to need further argument.

EVERETT P. WHEELER,
JOHN W. GRIFFIN,
Counsel for Defendants in Error.

# Supreme Court of the United States,

| | |
|---|---|
| WILLIAM S. LOVELL, Trustee in Bankruptcy of Knight, Yancey & Company, Plaintiff in Error, *against* ISIDORE NEWMAN & SON, *et al*, Defendants in Error. | October Term, 1912. No. 593. |

*Sirs.*—PLEASE TAKE NOTICE that the defendants in error in the above entitled action will, on the 13th day of January, 1913, at 12 o'clock noon, or as soon thereafter as counsel can be heard, at the Supreme Court Room in the City of Washington, District of Columbia, move this Court on the record herein:

FIRST: To dismiss the writ of error herein on the ground that this Court is without jurisdiction of the cause sought to be reviewed by said writ of error.

SECOND: To affirm the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, which is sought to be reviewed by the writ of error herein, on the grounds that the rulings, decision and judgment of said Circuit Court of Appeals are obviously correct; that it is manifest that the writ of error was taken for delay only;

and that the questions on which the decision of the cause depend are so frivolous as not to need further argument.

Together with this motion the defendants in error serve upon said plaintiff in error a copy of their brief to be filed in the Supreme Court in support of the said motion.

Dated, New York, December 17, 1912.

EVERETT P. WHEELER,
JOHN W. GRIFFIN,
Counsel for Defendants in Error,
27 William Street, New York City.

To Messrs.:

H. G. DUFOUR,
Canal-Louisiana Bank Building,
New Orleans, La.

W. A. BLOUNT,
Pensacola, Fla.

WALKER PERCY,
Brown-Marx Building, Birmingham, Ala.
Counsel for Plaintiff in Error.

## Brief on Behalf of Defendants in Error.

This case has been brought up by writ of error to review a judgment of the United States Circuit Court of Appeals for the Fifth Circuit, which affirmed a judgment rendered by the Circuit Court for the Eastern District of Louisiana. The petition appears at p. 1 of the record, the amended petition at p. 12, and the answer at p. 18. The petition alleges diversity of citizenship between the parties as the basis for the jurisdiction of the Circuit Court.

Owing to his doubt as to the jurisdiction of this Court on writ of error, the plaintiff in error submitted, on December 16, 1912, a petition for certiorari, and decision on this application is now pending. Full briefs, discussing the case on the merits, were submitted by both sides in connection with the application for certiorari.

### Questions Presented.

The question presented by the motion to dismiss is whether any other ground of jurisdiction than diversity of citizenship existed in the Circuit Court. If not, the judgment of the Circuit Court of Appeals is final and the motion to dismiss will be granted.

The question presented by the motion to affirm is whether a decision that, prior to bankruptcy, title to certain personal property had been conveyed by the bankrupts and that their trustee has no interest therein, presents, under the facts of the case, any points of law which are doubtful and worthy of extended argument.

## Statement of Facts.

The plaintiff below was William S. Lovell, Trustee in Bankruptcy of Knight, Yancey & Co., a firm which had been engaged in the cotton business, with its principal office at Decatur, Ala. The firm was adjudicated bankrupt by the United States District Court for the Northern District of Alabama on April 20, 1910. At that time there were in course of transportation 1311 bales of cotton which had been shipped by Knight, Yancey & Company to certain Italian cotton spinners. This cotton was shipped in part from Decatur, Ala., and in part from Selma, Ala., under through bills of lading which provided for carriage by rail from the point of shipment to New Orleans, and thence by steamship to Genoa. After the adjudication, the receivers appointed by the District Court for the Northern District of Alabama applied to the District Court for the Eastern District of Louisiana at New Orleans to stop the exportation of this cotton, on the ground that the bankrupt estate claimed title thereto. The District Court at New Orleans granted a restraining order, and subsequently an injunction *pendente lite*, which appears at pages 146-147 of the record. Under the order of the Court (pp. 144-145) it was provided that the cotton might be transported to destination if bond were given for its value, conditioned to pay said value to the trustee in case it were adjudged that the trustee had title. A bond was accordingly given, and the cotton was thereupon transported to destination. The trustee then began the present action in the Circuit Court for the Eastern District of Louisiana on the bond so given. The Italian cot-

ton spinners to whom the cotton had been shipped, intervened in the action by petition (Record, p. 30), alleging that they were the true owners of the cotton, that the bond in suit was given on their account and at their expense, and that they were the real parties in interest. The case was tried upon an agreed statement of facts, which appears in the record at pages 46-52. A jury was waived by stipulation.

The facts on which the title depends may be summarized as follows:

Certain contracts for the sale of cotton (Exhibits 1 to 8, inclusive; Record, pp. 71-78) had been made between Knight, Yancey & Co. and the Italian spinners, in December, 1909, and January, 1910. They called for the shipment by Knight, Yancey & Co. in January and February, 1910, of specified quantities of cotton, of specified grades, under through bills of lading to Genoa, Italy, via the Cotoniera Steamship Line. The spinners were to pay for the cotton at fixed prices, by means of drafts, to be drawn by Knight, Yancey & Co. on certain bankers designated in the contracts, at 90 or 180 days' sight.

At the time fixed in the contracts Knight, Yancey & Co. drew on the designated bankers drafts for the contract purchase price of the cotton (Exhibits 22-34, inclusive; Record, pp. 104-113). They attached to each of these drafts an invoice (Exhibits 47-58; record, pp. 117-128), which referred by date to the contract under which the sale was made, bore the name of the purchasing spinner, and stated the purchase price, computed in accordance with the contract. Knight, Yancey & Co. then attached to each draft and invoice a document purporting to be a bill of lad-

ing of the Southern Railway Company, drawn in accordance with the contract and consigning the cotton by rail to New Orleans, thence by the Cotoniera Steamship Line to Genoa (Exhibits 9-21, inclusive; Record, p. 87 et seq.) These bills of lading ran to shipper's order and contained a direction to notify Gino Gavirati, the Italian cotton broker through whom the contracts of sale had been made. A certificate of insurance was also attached to each set of documents, and under its terms the loss, if any, was payable to the indorsee of the certificate (Exhibits 35-46, inclusive; Record, pages 114-115). The bill of lading, the draft, the invoice and the certificate in each case contained a certain identifying mark, consisting of a combination of four letters, with which it was represented that the cotton was marked.

No cotton was in fact shipped at the time when Knight, Yancey & Co. issued these documents, and the signatures of the railroad agents on the bills of lading had been forged by Knight, Yancey & Co.

The drafts were thereupon sold by Knight, Yancey & Co. at their face value, less discount, and were, together with the forged bills of lading and insurance certificates, indorsed in blank by Knight, Yancey & Co., and, still fastened together, were delivered to the discounting bank. The documents were then sent forward to the bankers on whom the drafts were drawn. These bankers, who were duly authorized by the spinners and who, like the spinners, honestly believed that the documents represented cotton actually shipped, accepted the drafts, and thereupon the bills of lading duly indorsed were delivered to

the spinners. The drafts were duly paid by the bankers, who were reimbursed by the respective spinners (Statement of facts, paragraphs 5, 6, 7; Record, pp. 47-48).

It will be observed that this transaction was perfectly regular and in accordance with the customary method of doing business, except in the single particular that the bills of lading were forgeries, which fact was not known to the accepting bankers or to the spinners. The result was that Knight, Yancey & Co. received payment under the contracts without having shipped the cotton.

Thereafter Knight, Yancey & Co., at various dates between March 16, 1910, and April 11, 1910, actually shipped the cotton called for by the contracts. The cotton so shipped was of precisely the grades and quantities called for by the contracts, and each lot bore the same identifying marks as those on the corresponding false bills of lading, invoice, draft and insurance certificate. As more fully pointed out below (pp. 44, 45) the forged bills had been prepared with such foresight that the genuine bills when issued were precise duplicates of the forged bills in practically everything except date.

In the case of the Decatur shipments, Knight, Yancey & Co. suppressed the genuine bills of lading and concealed them, unindorsed, for some six weeks after bankruptcy. The trustee finally obtained them at some time subsequent to his appointment, which occurred on May 26, 1910.

In the case of the bills of lading for the Selma shipments a slightly different procedure was followed. The main office of Knight, Yancey & Co. was at Decatur, Ala. There was a branch of-

fice at Selma. The Selma office reimbursed itself from the Decatur office for its expenditures on the portion of the cotton shipped from Selma, by sending the Selma bills of lading to the Decatur office, through the local banks, attached to drafts on the Decatur office. These drafts were at once paid by the Decatur office, which thus obtained the Selma bills of lading free and clear of any claim on the part of the banks. This was on April 16, 1910,—several days prior to the bankruptcy, (Statement of facts, paragraph 9; Record, pp. 48-49). Knight, Yancey & Co. from that time on kept possession of these Selma bills, and, as pointed out below (p. 45), concealed them from the receivers. Finally the trustee secured them, some time subsequent to May 26th.

In other words, Knight, Yancey & Co. suppressed the genuine bills of lading. They did not use them to raise money; they did not sell or endeavor to sell them to anyone; they simply kept possession of them and concealed them, with the obvious intention that the spinners should get the cotton on the forged bills and that the fraud should thus be covered up.

Under this state of facts the Circuit Court, accepting the agreed statement of facts as a basis, found the ultimate facts, (Record, pp. 175-177). The Court found that by marking and shipping the cotton, Knight, Yancey & Co. "intended to appropriate and did appropriate it to the fulfilment of the said eight contracts of sale, and that by delivering it to the carrier they perfected delivery to the buyers under the terms of the said contracts;" that they retained the genuine bills of lading with the intention of suppressing them and allowing the buyers to get the cotton on

the forged bills; that Knight, Yancey & Co. and their trustee were estopped to assert any title to the cotton, and that in fact neither they nor the trustee had any title thereto.

The Court also handed down a written opinion (p. 37) and rendered judgment in favor of the defendants and intervenors (pp. 41-42). This judgment was affirmed (p. 212) by the Circuit Court of Appeals, whose opinion appears at pp. 202-211 of the record.

## Assignments of Error.

The assignments of error (Record, pp. 216-218), may be summarized as follows:

The first, second, seventh, thirteenth and fourteenth are general assignments,—that the Circuit Court of Appeals erred in affirming the Circuit Court and in not reversing.

The third assignment is that the Circuit Court did not set forth the entire agreed statement of facts in its findings. In fact the Court's practice was correct. Its duty was to find the ultimate facts, not to rehearse all the evidence (See p. 39, *infra*).

The fourth, eighth, ninth and first part of the eighteenth assignments, which challenge the finding as to Knight, Yancey & Company's intent in making the shipment, raise only questions of fact, which are not reviewable here.

The fifth, sixth, seventeenth and nineteenth assignments set up that the delay in shipping the cotton and the alleged failure to insure it prevented the passage of title. These assignments raise in part questions of fact which are not reviewable. In so far as they raise questions of

law, they are discussed at pp. 49-54, *infra*, and at pp. 48-69 of the brief in opposition to the petition for certiorari.

The tenth, eleventh, twelfth, fifteenth, sixteenth, and last part of the eighteenth assignments raise questions of mixed fact and law as to whether title passed and whether estoppel arose.

## Argument on Motion to Dismiss.

### I.

THE CIRCUIT COURT'S JURISDICTION WAS BASED ON DIVERSITY OF CITIZENSHIP.

The petition alleges (Record, pp. 1, 2) that the plaintiff is a citizen of Alabama; that the several members of the firm of Knight, Yancey & Company are and at the time of the adjudication were citizens of Alabama, Tennessee and South Carolina; and that the defendant firm and the individual members thereof were citizens of Louisiana. These allegations show diversity of citizenship between the parties, which is conceded to exist, and which was the ground of Federal jurisdiction. Under the Act of Congress approved March 3, 1891, Sec. 6 (U. S. Comp. Stat. 1901, pp. 549, 550), and under Section 128 of the New Judiciary Code, approved March 3, 1911, the judgment of the Circuit Court of Appeals is, therefore, final in the present case and the motion to dismiss must be granted unless some other ground of jurisdiction existed.

## II.

DIVERSITY OF CITIZENSHIP WAS THE ONLY BASIS FOR THE JURISDICTION OF THE CIRCUIT COURT.

1. *The fact that the plaintiff is a trustee in bankruptcy does not give jurisdiction to the Federal Courts.*

This proposition is so well settled under the present Bankruptcy Act that the citation of authority seems superfluous.

Bankruptcy Act, Sec. 23a.

In Spencer v. Duplan Silk Co., 191 U. S. 526, at 531, this Court said:

"The mere fact that plaintiff was trustee in bankruptcy did not give jurisdiction."

To same effect,

Bardes v. First National Bank, 178 U. S. 524.

2. *No Federal question was alleged or was involved in the Circuit Court.*

It is, of course, well settled that, where the question is one of the Circuit Court's jurisdiction, and it is claimed that the case arises under the Constitution, laws, or treaties of the United States, that fact must appear from the plaintiff's statement of his case in his complaint or petition; and that, unless this appears, the argument of some such question in the course of subsequent proceedings is not enough to sustain the jurisdiction.

In Colorado Central Cons. Min. Co. v. Turck, 150 U. S. at 143, the Court said:

"When, however, the original jurisdiction of a circuit court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the Circuit Court, at the time its jurisdiction is invoked, could properly take cognizance."

And in Borgmeyer v. Idler, 159 U. S. 408, the Court said:

"In Colorado Cent. Consol. Min. Co. v. Turck, 150 U. S. 138, we held that when the original jurisdiction of a circuit court of the United States is invoked upon the ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the outset, from the pleadings, that the suit is one of that character, of which the Circuit Court could properly take cognizance at the time its jurisdiction is invoked; and that when the jurisdiction of a circuit court is invoked solely on the ground of diverse citizenship, the judgment of the Circuit Court of Appeals is final, although another ground for jurisdiction in the Circuit Court may be developed in the course of subsequent proceedings in the case."

The same rule is stated in Press Publ. Co. v. Monroe, 164 U. S. 105, 110, as follows:

"In order to give the Circuit Court jurisdiction of a case as one arising under the Constitution, laws, or treaties of the United States, that it does

so arise must appear from the plaintiff's own statement of his claim."

In Ex parte Jones, 164 U. S. 691 at 693, 694, the Court said:

"But even if another ground were developed in the course of the proceedings, the judgment of the Court of Appeals would be final if the jurisdiction of the Circuit Court were originally invoked solely upon the ground of citizenship."

Turning then to the plaintiff's petition (Record, p. 1), we find the following allegations: (1) diversity of citizenship; (2) plaintiff's appointment as trustee; (3) the issuance by the District Court of "an injunction *pendente lite*," followed by the giving of the bond in suit. At page 6 it is alleged:

"Your petitioner further avers that the said 1311 bales of cotton were at the time of the bankruptcy proceedings and have ever since been the property of Knight, Yancey & Company, and that as trustee in bankruptcy of the said Knight, Yancey & Company, your petitioner as aforesaid is the owner of and has the right, title, and interest in and to the said 1311 bales of cotton, and that your petitioner is therefore entitled to proceed, etc."

The petition thus simply asserts a legal title in the plaintiff as trustee, as successor to Knight, Yancey & Co. The same theory is reiterated in the supplemental petition (Record, p. 12). It alleges (p. 13):

"The said Receivers, as petitioners in said suit, claimed the title, as owners, to all of said cotton to be in them as such Receivers and in the bankrupt estate of Knight, Yancey & Company, Bank-

rupt. * * * Your petitioner reiterates that the title to all of the cotton described in said original petition was in said Knight, Yancey & Company, Bankrupt, and is in said bankrupt estate and in your petitioner as the Trustee in Bankruptcy of Knight, Yancey & Company, Bankrupt."

Here again, the assertion is simply one of title derived from the bankrupts.

If anything were needed to emphasize this further, it is found in the opinion of the Circuit Court rendered on the hearing of exceptions to the petition. The Court said (Record, p. 16):

"As this case stood on the original petition, in view of some of the allegations of the petition in the District Court referred to, there might have been some doubts as to plaintiff's right to proceed at law, but, considering the supplemental petition whereby the plaintiff has eliminated those pleadings from the instant case and *stands solely on his claim of absolute ownership of the cotton*, it is clear the action is properly at law. If anything were needed to strengthen this, the statement of plaintiff's counsel in open court that he *disavows any intention of claiming a voidable preference* against anyone, in regard to the shipment of the cotton, is sufficient."

The petition, then, is at law, and is based solely on a claim of title. There is no claim of voidable preference or of conveyance in fraud of creditors; nor is there any claim that the plaintiff as trustee has any further or greater rights than the bankrupts had. The question is simply one of title under general law. Obviously no Federal question is suggested by such a petition.

The case of Spencer v. Duplan Silk Co., 191 U. S. 526, is closely in point. There a trustee in

bankruptcy brought an action in trover in a state court for the conversion of certain goods alleged to belong to the estate. Diversity of citizenship existed and the case was removed to the Circuit Court by the defendant. The trustee, after decision in the Circuit Court of Appeals, obtained a writ of error from this Court. The writ of error was, however, dismissed for lack of jurisdiction, the Court saying by Mr. Chief Justice Fuller:

"But a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the Constitution or the validity or construction of the laws or treaties of the United States, upon the determination of which the result depends, and which appears in the record by the plaintiff's pleading. * * *

"Plaintiff's declaration set forth no matter raising any controversy under the Constitution, laws, or treaties of the United States. It is true that if the lumber and materials belonged to Bennett & Rothrock on January 13, 1900, plaintiff in error succeeded to the title of the firm on the adjudication; but the question of Bennett & Rothrock's ownership on that day in itself involved no Federal controversy, and the mere fact that plaintiff was trustee in bankruptcy did not give jurisdiction. Bardes v. First Nat. Bank, 178 U. S. 524. Indeed, if the case had not been removed, and had gone to judgment in the court of common pleas, and that judgment had been affirmed by the Supreme Court of Pennsylvania on the same grounds as those on which the Circuit Court of Appeals proceeded, a writ of error could not have been brought under § 709 of the Revised Statutes (U. S. Comp. Stat. 1901, p. 575), for the case would not have fallen within either of the classes enumerated in that section as the basis of our jurisdiction. The validity of the bankruptcy act

was conceded, and no right specially set up or claimed under it was denied."

So in Cramer *v.* Wilson, 195 U. S. 408, this Court said:

"We have repeatedly held that where the question in a state court is not whether, if the bankrupt had title, it would pass to his assignee, but whether he had title at all, and the state court decided that he had not, no federal question is presented."

To the same effect

Blake, Trustee, *v.* Openhym, 216 U. S. 322;
Chapman *v.* Bowen, 207 U. S. 89;
Scott *v.* Kelly, 22 Wall. 57.

No question is suggested by the petition as to the interpretation of the Bankruptcy Act, or as to the nature and extent of the rights of a trustee appointed thereunder. No Federal question whatever is raised by the petition. It simply claims a title accruing under general principles of common law, as did the plaintiff in Press Publishing Co. *v.* Monroe, 164 U. S. 105, where this Court said in dismissing a writ of error:

"The plaintiff in her complaint did not claim any right under the Constitution and laws of the United States or in any way mention or refer to that Constitution or to those laws; and at the trial she relied wholly upon a right given by the common law and maintained her action upon such a right only."

In Scott *v.* Kelly, 22 Wall. 57, this Court said:

"The question presented for the decision of the state court was not whether, if the bankrupt had title, it would pass to his assignees by operation of the bankrupt act, but whether he had title at all. The court decided that he had not. Such a decision by a state court does not present a question of which this court can take jurisdiction upon a writ of error."

If it be argued that the Courts below held that the trustee had no greater rights than the bankrupts would have had and that this holding involved a construction of the Bankruptcy Act, the answer is twofold:

(1) No such question is raised by the petition. It simply alleges that the bankrupts had a title to which the trustee has succeeded. It does not claim a conveyance in fraud of creditors, or a voidable preference, nor does it allege any circumstances which put the trustee in a better position than that which the bankrupts would have occupied. Since, therefore, the petition does not raise the question, the fact that the trustee attempts to raise it, *arguendo,* does not give jurisdiction, as shown by the authorities cited above, pp. 13, 14.

(2) The decision that the trustee had only the rights which the bankrupts would have had was so obviously correct (as more fully shown at pp. 39-43, *infra;* and pp. 12-26 of brief in opposition to certiorari), that, even if a Federal question was involved therein, this Court would not take jurisdiction. In the words of Mr. Chief Justice Fuller in Leonard *et al. v.* Vicksburg, etc., R. R. Co., 198 U. S. 416, at 422, "the Federal question thus suggested had been so explicitly foreclosed by previous decisions as to leave no room

for real controversy." In *Ex parte* Spies, 123 U. S. 131, this Court said:

"In our opinion the writ ought not to be allowed by the Court if it appears from the face of the record that the decision of the federal question which is complained of was so plainly right as not to require argument, and especially if it is in accordance with our own well considered judgments in similar cases."

The plaintiff in error contends that a Federal question is raised because the action is brought on a bond given in a proceeding in the District Court. It is believed that this contention may be answered in a few words. There are, of course, familiar cases holding that the Federal Courts have jurisdiction, irrespective of citizenship, of actions on the bonds of Federal Court clerks and marshals; and on bonds given in Federal Courts by plaintiffs in attachment or injunction proceedings. In the case of the bonds of the clerks and marshals of the Federal Courts, the existence of a Federal question is obvious. The liability on such a bond depends on the extent of the duties and authority of the clerks and marshals and on the propriety of their official actions under the statutes. Plainly the Federal Courts have jurisdiction thus to define the rights and obligations of their own officers in the exercise of authority given them pursuant to the laws of the United States, and to determine the liability upon their bonds, given under the same laws.

Howard *v.* United States, 184 U. S. 676.

In the cases of attachment and injunction bonds, the right sought to be enforced is one arising un-

der the laws of the United States. The rules which govern the giving of injunction bonds are laws of the United States, and actions involving the validity, construction or effect of such bonds, or the measure of damages thereunder, are actions arising under the laws of the United States.

Tullock *v.* Mulvane, 184 U. S. 497;
Leslie *v.* Brown, 90 Fed. Rep. 171.

So, too, the State laws which govern the issuance of attachments at law and the giving of bonds by the plaintiff, being adopted as Federal laws by the Conformity Act, are laws of the United States and actions on such bonds are within the jurisdiction of the Federal Courts.

Files *v.* Davis, 118 Fed. Rep. 465.

But the bond in the case at bar is of a very different character. No question arises as to the validity of the bond or as to its construction or effect. There is no dispute as to the measure of damages under it. The sole question is of title to the cotton,—which depends, not on any law of the United States, but on the general principles of the common law. As was said in Pope *v.* Louisville, N. A. & C. Ry. Co., 173 U. S. 573, at page 579:

"The liability of defendants arose under general law, and was neither created nor arose under the Constitution or laws of the United States."

In Chapman *v.* Bowen, 207 U. S. 89, the Court said:

"The decision below proceeded on well-settled principles of general law, broad enough to sustain

it without reference to the provisions of the bankruptcy act."

The bond is merely an agreement by a surety to pay the value of the cotton, which is fixed by stipulation (Record, p. 151), if the trustee had title to the cotton. To quote the words of Mr. Justice White in Tullock *v.* Mulvane, 184 U. S. 497, at 509, the action on this bond does not involve "the construction or effect of a law of the United States or a judgment, decree, or order or other act done under and by virtue of the authority of a court of the United States or a claim of immunity thereunder."

And see Avery *v.* Popper, 179 U. S. 305.

If the goods had not been bonded and removed from the jurisdiction, and if the trustee had brought his suit in trover, replevin, or detinue, it is obvious that no Federal question would have been raised. The question would have been simply one of general law and the action could have been brought in the Federal Court only if diversity of citizenship had existed (Bankruptcy Law, § 23). No Federal question is raised by the substitution, through the medium of a bond, of a surety's liability for the security afforded by the presence of the cotton. It would seem that to state such a proposition is to answer it.

The distinction between bonds given by a complainant as a condition of obtaining an injunction, and bonds like the present, given for the release of property, is plain. The former are bonds to pay for such damage as the court causes by an unwarranted injunction. The damages are caused by the action of the court itself and the liability therefor should fitly be enforced by the same court. But no such considerations apply to a bond given

for the release of property. The liability there depends simply and solely on the question of title, and that question is not a Federal one

The fact that a Federal Court has in some manner acted in reference to the subject matter does not, except where the Court has possession of the property in dispute, draw controversies respecting it into the Federal Courts.

Frank *v.* Vollkommer, 205 U. S. 521.

In the present case the property was not in the possession of any Federal Court.

There is no Federal jurisdiction even over suits on Federal judgments, unless a Federal question is raised,—for instance, by a dispute regarding the validity, effect, or interpretation of such a judgment, as in Crescent Live Stock Co. *v.* Butchers' Union, 120 U. S. 141. In Provident Sav. Society *v.* Ford, 114 U. S. 635, this Court said:

"What is a judgment but a security of record, showing a debt due from one person to another? * * * It is simply the case of an ordinary right of property sought to be enforced. A suit on a judgment is nothing more, unless some question is raised in the case (as might be raised in any of the cases specified) distinctly involving the laws of the United States."

In Metcalf *v.* City of Watertown, 128 U. S. 586, at 588, this Court said:

"Nor can the jurisdiction of the Circuit Court be maintained upon the theory that the suit is one arising under the Constitution or laws of the United States. The fact that it was brought to recover the amount of a judgment of a court of the United States does not of itself make it a suit of that character; for the plaintiff, without raising by his complaint any distinct question of a Federal nature and without indicating by proper averment how the determination of any question

of that character is involved in the case, seeks to enforce an ordinary right of property by suing upon the judgment merely as a security of record showing a debt due from the City of Watertown."

So in Gill *v.* Oliver, 11 How. 529 at 545, it was held that the fact that a treaty was incidentally drawn in question did not give Federal jurisdiction. And in Bonin *v.* Gulf Company, 198 U. S. 115, it was held that the assertion of title to real property under a patent from the United States did not confer on the Circuit Court jurisdiction of an action for the recovery of the property in question.

It is submitted that Federal jurisdiction of a suit to try title to the cotton in question is in no respect conferred by the removal of the cotton and the giving of a bond.

If any argument be based on the fact that the order of the District Court (Record, pp. 144, 145) required a bond conditioned for suit in the "Circuit or District Court of the United States for the Eastern District of Louisiana," the obvious answer is that no order of the District Court could enlarge the scope of Federal jurisdiction. Doubtless the bond would not have been accepted by the Court or by counsel for the receivers unless there had been diversity of citizenship between the parties; but, however that may be, no order of the District Court could enlarge either its own jurisdiction or that of the Circuit Court, and the reference in the order to suit in the Circuit or District Court has no bearing on this Court's jurisdiction of the writ of error.

Moreover, even if the giving of the bond did confer Federal jurisdiction, such jurisdiction would be subject to the principle laid down in Pope *v.* Louisville N. A. & C. Ry. Co., 173 U. S. 573, to the effect that jurisdiction based on an-

other proceeding in a Federal Court is of no higher order than that of the original proceeding. As pointed out below (pp. 28-30), the action of the District Court in granting the injunction *pendente lite*, and in taking the bond, could not have been reviewed in this Court. That being the case, no action which depends for its jurisdiction on the proceeding in the District Court, can be brought here for review.

Pope *v.* Louisville N. A. & C. Ry. Co., 173 U. S. 573;
Rouse *v.* Letcher, 156 U. S. 47;
Gregory *v.* Van Ee, 160 U. S. 643.

This subject is further discussed at pages 28-30, *infra*.

3. *Ancillary Jurisdiction.*

It is submitted that plainly the doctrine of ancillary jurisdiction has no application to the present case. A Federal Court may, irrespective of citizenship, exercise jurisdiction over controversies with respect to property in its own possession or with respect to the rights of third parties necessarily involved in a litigation pending in the Federal Court. So the Circuit Court may entertain a bill for a receiver in aid of an action at law in that Court, or a bill to enjoin prosecution of a suit or to construe or enforce a judgment of the same Court. In Compton *v.* Jesup, 68 Fed. Rep. 263, the subject of ancillary jurisdiction is elaborately discussed by Judge Taft.

In such cases, the ancillary proceeding is auxiliary and incidental to the main suit; and jurisdiction is taken almost *ex necessitate*, to prevent fail-

ure of justice or to avoid remitting to a State Court a controversy intimately interwoven with the subject matter of the Federal proceeding. In every case which has been found, the so-called ancillary proceeding was *incidental to a plenary suit in the same court.*

In Lamb *v.* Ewing, 54 Fed. Rep. 269 at 273, the Court said:

"The technical question of jurisdiction is solved by the ruling that in all ancillary or auxiliary proceedings for the enforcement of judgments rendered, and in proceedings for the protection of the rights of third parties, the jurisdiction is supported by that of the original action or suit."

In the present case, however, the District Court proceeding in Louisiana was not plenary, but was itself ancillary to the bankruptcy petition in Alabama. (Babbitt *v.* Dutcher, 216 U. S. 102). The jurisdiction of the Louisiana District Court depended on that of the Alabama Court. A provisional remedy was asked for,—an injunction *pendente lite,*—for the sole purpose of preserving to the trustee the opportunity to try the title. Such a summary proceeding is not a "main suit," upon which the subsequent plenary action in the Circuit Court can rest for its jurisdiction.

It is a contradiction in terms to say that a plenary suit in the Circuit Court to try title is in any respect ancillary to a proceeding in the District Court, the sole object of which was to enjoin the export of the goods pending the Circuit Court action. If anything, the District Court proceeding was the ancillary one. No case ever decided, so far as can be found, has held that a plenary suit may derive its jurisdiction from that of a previous provisional proceeding in another Court.

Moreover, even if the doctrine of ancillary jurisdiction were applicable, the case could not be brought to this Court because (1) the District Court proceeding was a "proceeding in bankruptcy" not a "controversy arising in bankruptcy proceedings," within the meaning of Sec. 24 of the Bankruptcy Act; (2) therefore the District Court proceeding was reviewable only by the Circuit Court of Appeals on petition to revise, and not by this Court; and (3) since the District Court proceeding could go only to the Circuit Court of Appeals, the action in the Circuit Court, if ancillary to it, would be subject to the same limitation. The following amplification of these propositions may be made:

(1) The District Court proceeding was not plenary; it was not itself a controversy respecting title, but a mere proceeding in the course of the administration of the estate, to prevent an alleged threatened dissipation of assets. In re Farrell, 176 Fed. Rep. 505, the Circuit Court of Appeals for the Sixth Circuit said:

"Nothing, as it seems to us, can be regarded as a controversy 'arising in bankruptcy proceedings' within the purview of subdivision a, § 24, where the subject matter and object of the proceedings are within the power to make a summary order. Certainly this is true where plenary action is not sought."

And In re Mueller, 135 Fed. Rep. 711, the same Court said:

"By 'controversies arising in bankruptcy proceedings' is meant those *independent or plenary suits* which concern the bankrupt's estate, and arise by intervention or otherwise between the

trustee representing the bankrupt's estate and claimants asserting some right or interest adverse to the bankrupt or his general creditors."

In Barnes *v.* Pampel, 192 Fed. Rep. 525 at 527, the Court said:

"The distinction between 'proceedings in bankruptcy,' reviewable under section 24b and the 'controversies arising in bankruptcy proceedings,' appealable under section 24a, is clearly defined; the former including 'administrative orders and decrees in the ordinary course of bankruptcy between the filing of the petition and the final settlement of the estate,' and the latter including 'those *independent or plenary suits* which concern the bankrupt's estate and arise by intervention or otherwise between the trustees representing the bankrupt's estate and claimants representing some right or interest adverse to the bankrupt or his general creditors.' The remedies afforded by the two subsections referred to are mutually exclusive."

In Hewit *v.* Berlin Machine Works, 194 U. S. 296, at 300, it is held that "an intervention raising a distinct and separable issue" as to title is a "controversy arising in bankruptcy proceedings."

(2) A "proceeding in bankruptcy" is reviewable only by petition to revise. This Court said in First National Bank *v.* Chicago Title & Trust Co., 198 U. S. 280, at 288:

"If the proceeding in the District Court was a proceeding in bankruptcy and not an independent suit, no appeal lay to the Circuit Court of Appeals, and the jurisdiction of that court was confined to revision in matter of law 'on due notice and petition' under clause b of section 24" (of the bankruptcy act.)

And in such a case no appeal lies to this Court.

Holden *v.* Stratton, 191 U. S. 115.

Indeed, it is plain without argument that the order of the District Court, which was made in the exercise of discretion, granting an injunction *pendente lite* was not reviewable in this Court.

(3) It therefore follows that, if the case at bar is ancillary to the proceeding in the District Court, the case cannot be brought before this Court.

In Pope *v.* Louisville N. A. & C. Ry. Co., 173 U. S. 573 at 577, this Court said:

"We have repeatedly held that jurisdiction of these subordinate actions or suits is to be attributed to the jurisdiction on which the main suit rested; and hence that where jurisdiction of the main suit is predicated on diversity of citizenship, and the decree therein is, therefore, made final in the Circuit Court of Appeals, the judgments and decrees in the ancillary litigation are also final."

And at pp. 578, 579:

"The only ground of Federal jurisdiction set up in the bills was diversity of citizenship, and if the decrees therein had been passed on by the Circuit Court of Appeals, the decision of that court would have been final under the statute. And as this suit was in effect merely in collection of alleged assets of the Atlantic Company, it must be regarded as auxiliary, and the same finality attaches to the decree of the Circuit Court of Appeals therein.

"And this is true although another ground of jurisdiction might be developed in the course of the proceedings, as it must appear at the outset that the suit is one of that character of which the

Circuit Court could properly take cognizance at the time its jurisdiction is invoked. * * *

"We cannot accept the suggestion that the mere order of a Federal court, sitting in chancery appointing a receiver on a creditor's bill, not only enables the receiver to invoke Federal jurisdiction, but to do this independently of the ground of jurisdiction of the suit in which the order was entered, and thereby affect the finality of decrees in the Circuit Court of Appeals in proceedings taken by him."

To the same effect is Rouse *v.* Letcher, 156 U. S. 47, where this Court said at page 50:

"Decrees upon controversies separable from the main suit may indeed be separately reviewed, but the jurisdiction of the Circuit Court over such controversies is not, therefore, to be ascribed to grounds independent of jurisdiction in the main suit."

In Gregory *v.* Van Ee, 160 U. S. 643 at 645, 646, this Court said:

"That the exercise of the power of disposition by a Circuit Court of the United States over such an intervention is the exercise of power invoked at the institution of the main suit; and that it is to that point of time that the inquiry as to the jurisdiction of the Circuit Court must necessarily be referred. Therefore, that, if the decree in the main suit were final, decrees in accessory and subordinate proceedings would be also final, and appeals therefrom could not be sustained. * * *

"And even if the decree on such proceedings may be in itself independent of the controversy between the original parties, yet if the proceedings are entertained in the Circuit Court because of its possession of the subject of the ancillary or supplemental application, the disposition of the

latter must partake of the finality of the main decree, and cannot be brought here on the theory that the Circuit Court exercised jurisdiction independently of the ground of jurisdiction which was originally invoked as giving cognizance to that court as a court of the United States."

4. *No Jurisdiction by Consent.*

It is suggested that the giving of a bond conditioned for suit in the Circuit Court (Record, p. 150) was a consent to be sued in the Circuit Court within Sec. 23b of the Bankruptcy Act. The contention may be briefly answered:

1. The District Court's order provided (Record, pp. 144, 145) that the cotton might not be moved unless a bond were given which contained that provision. The giving of a bond so worded, was required by this order as a condition precedent to the moving of the cotton. When given, its effect was at most that of an agreement to appear in the Circuit Court, *which had jurisdiction by reason of diversity of citizenship.* It will be observed that the bond specifically recites in two places (Record, pp. 149, 150) that the surety firm, Isidore Newman & Son, is at "New Orleans, La." and provides that the surety alone may be sued. The citizenship of the bankrupts and that of the surety were known, and the bond would never have been accepted, had not diversity existed. How can it be claimed that the giving of a bond to secure suit in a court which had jurisdiction on one ground, operates as a consent to its jurisdiction on a wholly different ground? A claim almost identical was disposed of by this Court in Spencer *v.* Duplan Silk Co., 191 U. S. 526. There a trustee in bankruptcy sued in a State Court

and, there being diversity of citizenship, the defendants removed it to the Circuit Court. The trustee sought to have the decision of the Circuit Court of Appeals reviewed in this Court, on the ground that the defendants had consented to the jurisdiction of the Circuit Court under Sec. 23 of the Bankruptcy Act. In dismissing the writ of error, this Court said at pp. 531, 532:

"Plaintiff brought his action in the State Court, and its removal on the ground of diverse citizenship placed it in the Circuit Court as if it had been commenced there on that ground of jurisdiction, and not as if it had been commenced there by consent of defendant under § 23 of the bankruptcy act. The right to removal is absolute, and cannot be trammeled by such a consequence."

So, if the Circuit Court has jurisdiction by reason of diversity, an agreement to appear in that Court will not be held to confer on the Court an added jurisdiction. Jurisdiction by consent will certainly not be presumed.

It is suggested by the plaintiff in error, at page 21 of his brief in support of the petition for certiorari, that the test should be whether, if the allegations of diversity of citizenship were stricken out, any ground for jurisdiction would remain in the petition, and it is argued that here there would have been another ground,—that of consent. This argument obviously begs the question. But, apart from this fallacy, such a test cannot be applied here, for the reason that the provision in the bond as to suit in the Circuit Court must be read in the light of the admitted fact that jurisdiction existed on the ground of diversity of citizenship. Since there was this other basis for

jurisdiction, the provision in question was simply an agreement to appear in a court which had jurisdiction on other grounds. A different question would be presented if it had been agreed that suit might be brought in the Circuit Court in a case where that Court had no other ground of jurisdiction than consent. Moreover, it cannot be said that a provision in a bond inserted in obedience to the specific order of a Court, constitutes "consent," in any fair sense of the term, on the part of the person giving the bond.

In his brief in support of the petition for certiorari the trustee refers, at pp. 21 and 22, to cases holding that appearance and pleading to the merits constitutes consent within § 23b, but this has been held only in cases where there was no other ground for jurisdiction. It is impossible to say that the appearance and pleading to the merits in the present case was a consent to the jurisdiction, for the reason that *the defendants could not have objected to the jurisdiction.* It existed on the ground of diversity, and therefore no objection could possibly have been taken.

2. The consent provision of Sec. 23b does not apply to the Circuit Courts. That provision has a certain definite purpose. It frequently happened that a question of title to or a lien upon property claimed by a bankrupt estate arose in proceedings in the District Court. That Court in such a case could take no action, other than to determine whether the adverse claim was frivolous. It could not entertain a suit to try title.

Bardes v. First National Bank, 178 U. S. 524.

The object of the provision for consent was to enable the District Court, if the parties were willing, to pass on the entire controversy by summary or plenary proceedings, as might be proper in the particular case, and to determine any question of title or lien without putting the parties to the delay, expense and trouble of litigation in another Court.

It is believed, accordingly, that the provision of section 23b regarding consent, properly construed, applies only to the District Courts and is inapplicable to the Circuit Courts. While there is no authoritative decision settling this question. the conclusion just suggested appears to follow not only from a consideration of the object of the provision, but also from a comparative analysis of the three paragraphs of section 23 and from an examination of the authorities.

Paragraph *a* of section 23 reads as follows:

"The United States Circuit Courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, *in the same manner and to the same extent only* as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants."

It will be noted that the present is a controversy at law between a trustee, as such, and adverse claimants, concerning property claimed by the trustee, and therefore, under this section, the Circuit Court had jurisdiction to the same extent only as though the controversy had been between the bankrupts and the adverse claimants. In

other words, its jurisdiction could only be exercised in cases where the requisite amount was involved and where there was diversity of citizenship or a Federal question.

Paragraph *c* of § 23 reads as follows:

"The United States Circuit Courts shall have concurrent jurisdiction with the courts of bankruptcy, within their respective territorial limits, of the offenses enumerated in this act."

It will be seen, therefore, that paragraphs *a* and *c* refer specifically to the Circuit Court and confer on it certain well-defined jurisdiction.

Paragraph *b*. however, reads as follows:

"Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision *b*, and section sixty-seven, subdivision *e*, and section seventy subdivision *e*."

If this paragraph be interpreted to mean that a trustee may sue in the Circuit Court, irrespective of the presence of a Federal question, irrespective of diversity of citizenship and irrespective of the amount involved, whenever the defendant consents, then paragraph *b* is contradictory of paragraph *a*. Paragraph *a* specifically limits the Circuit Court's jurisdiction to certain cases, and it is impossible to hold, in construing the three paragraphs together, that, as to suits by the trustee, paragraph *b* removes the limits on the Circuit Court's jurisdiction which paragraph *a* imposes.

The consent provision is treated as applicable to the *District* Courts in

Jaquith v. Rowley, 188 U. S. 620;
In re Durham, 114 Fed. Rep. 750;
Collier on Bankruptcy, 8th ed., pp. 402, 403.

In all the authorities referred to by the trustee (pp. 21-22 of his brief in support of petition for certiorari), the consent provision of section 23b is applied to the *District* Court. The same idea would seem to have been in the mind of this Court in the case of Louisville Trust Co. v. Comingor, 184 U. S. 18, in the following passage (p. 24):

"If the jurisdiction of the District Court was not consented to, then the state court under the circumstances of this case was the proper forum and the matters in dispute were to be disposed of there."

And a similar view appears to be implied in the following passage from the opinion of this Court in Bardes *v.* First Nat. Bank, 178 U. S. 524 (537):

"On the contrary, Congress, by the second clause of section 23 of the present bankrupt act, appears to this court to have clearly manifested its intention that controversies not strictly or properly part of the proceedings in bankruptcy, but independent suits brought by the trustee in bankruptcy to assert a title to money or property as assets of the bankrupt against strangers to those proceedings, should not come within the jurisdiction of the district courts of the United States 'unless by consent of the proposed defendant,' of which there is no pretence in this case.

"One object in inserting this clause in the act may well have been to leave such controversies to be tried and determined for the most part in the local courts of the state, to the greater economy and convenience of litigants and witnesses."

In both these passages the Court seems to have in mind that suits not coming within the provisions of section 23a must be brought in either the state court or the District Court, and the implication at least is against jurisdiction in the Circuit Court on consent.

The text writers seem also to treat the consent provision as applicable only to the District Courts. Loveland (Bankruptcy, 3d ed. p. 97) says that "*the courts of bankruptcy*" are vested with jurisdiction by consent; Collier, (Bankruptcy, 8th ed. pp. 402, 403) says "unless the proposed defendant shall consent to the bringing of such suits in the *District Court*" (cf. p. 395); and in I Remington, Bankruptcy, p. 1046 note, the view is expressed that consent "will not confer jurisdiction on the U. S. Circuit Court, unless that court has jurisdiction over the subject matter as well."

It is recognized that some of the dicta of the Court in the case of Bardes v. First Nat. Bank, 178 U. S. 524, are not wholly consistent with the construction just suggested, but the Court there was not considering the consent provision, and the point certainly was not decided. The Court remarks, at p. 536, that paragraph 23b "applies both to the District Courts and to the Circuit Courts of the United States as well as to the State Courts." As already stated the Court was not considering the consent provision, and it would seem very plain that *this* provision cannot be so broadly construed.

It cannot, for instance, be applied to the state courts, because Congress has no power to enlarge the jurisdiction of the state courts or to provide that consent shall give jurisdiction in those courts. Nor can the provision in question be applied to the Circuit Courts of Appeals. It would be un-

thinkable that Congress meant it to apply to them and thus to give them original jurisdiction. The consent provision does not, then, apply to all "courts". It requires construction to make it intelligible. It is submitted that, as the jurisdiction of the Circuit Court is fully defined by 23a and 23c, the consent provision of 23b does not apply to the Circuit Courts any more than to the Circuit Courts of Appeals or to the state courts.

It is also worth noting that the amendment of 1903, which added to Section 23b the words "except suits for the recovery of property under section sixty, subdivision b, and section sixty-seven, subdivision e" was designed to extend the jurisdiction of the *District* Court.

Collier, Bankruptcy, 8 ed., p. 398.

In the same way, the words "unless by consent of the proposed defendant" were designed to extend the jurisdiction of the *District* Court, the court of bankruptcy.

It is believed that the Court will not, in the absence of a much clearer expression of the legislative intent than Section 23b, hold that there has been conferred on the Circuit Court jurisdiction by consent *irrespective of diversity of citizenship, Federal question, and amount in controversy,* especially when §23a indicates the contrary.

Congress has not seen fit to give a right of review in this Court in suits brought by or against trustees in bankruptcy to try title to property, except where a Federal question is raised. Certainly it is illogical and not in accord with the general principles on which this Court's jurisdic-

tion rests, to say that the election of the spinners to take away their cotton and substitute a bond, conferred on the trustee a right of review in this Court which he would not otherwise have had.

As the result of the foregoing discussion, it is submitted that no ground existed for the Circuit Court's jurisdiction, except diversity of citizenship, and that accordingly this writ of error should be dismissed.

## Argument on Motion to Affirm.

As already stated, page 4, *supra,* the case has been fully argued on the merits in the briefs submitted on December 16th, 1912, on the application for certiorari. It is believed that to reproduce that argument in full here would be burdensome rather than helpful to the Court. There will accordingly be given here only a condensed summary of the argument, with a reference to the more important authorities, and for a more detailed argument the Court is respectfully referred to the brief submitted by the defendants in error in opposition to the petition for certiorari.

### Findings of Fact.

It has been pointed out above (pp. 9, 10), that the Circuit Court found (Record, pp. 175-177) that Knight, Yancey & Company, by marking and shipping the cotton "intended to appropriate and did appropriate it to the fulfillment of the said eight contracts of sale, and that by delivering it to the carrier they perfected delivery to the buyers under the terms of the said contracts." The Court also found that Knight, Yancey & Company re-

tained the genuine bills of lading for the purpose of suppressing them and allowing the cotton to be claimed by the buyers on the forged bills, and further found that Knight, Yancey & Company and their trustee were estopped to assert any title to the cotton.

The findings of fact are, of course, conclusive here.

> Revised Statutes, §649;
> Dooley *v.* Pease, 180 U. S. 126;
> Tyng *v.* Grinnell, 92 U. S. 467.

It will be noted that the agreed statement of facts (Record, pp. 46-52) sets forth the evidential facts, and that the Circuit Court found the ultimate facts, in accordance with proper practice.

> Alexander *et al.* v. Machan, 147 U. S. 71, at 76;
> Merchants Mutual Ins. Co. *v.* Allen, 121 U. S. 67, at 72.

## I.

THE TRUSTEE STANDS IN THE SHOES OF KNIGHT, YANCEY & CO. AND HAS NO GREATER RIGHTS THAN THEY HAD PRIOR TO THE ADJUDICATION.

The petition in the Circuit Court (Record, pp. 1-7) simply alleges (p. 6) that the cotton, at the time of the bankruptcy proceedings, was the property of Knight, Yancey & Company and that the trustee has succeeded to their title. The supple-

mentary petition also alleges (Record, p. 13) that title to the cotton "was in Knight, Yancey & Company, bankrupt, and is in said bankrupt estate and in your petitoner as the trustee." The plaintiff disavowed any claim of preference in open court (Record, p. 16), and no claim of fraudulent conveyance or of preference is made by the pleadings or by the assignments of error. The action is simply an action at law to try title, and the trustee avowedly stands in the bankrupts' shoes.

It is of course thoroughly settled that a trustee, in the absence of preference, fraudulent conveyance, etc., takes the estate subject to all titles, liens and equities to which it was subject in the hands of the bankrupts.

Zartman *v.* First Natl. Bank, 216 U. S. 134;
Hewit *v.* Berlin Machine Works, 194 U. S. 296;
Yeatman *v.* New Orleans Saving Institution, 95 U. S. 764.

Estoppels binding on the bankrupt are binding on his trustee.

Lowell on Bankruptcy, § 313;
Aldine Trust Co. *v.* Smith, 182 Fed. 449;
Re McKay & Aldus, 1 Lowell 345.

The same rule is applied in England.

Harris *v.* Truman, L. R. 9 Q. B. D. 264.

Some argument was made in the lower court to the effect that a trustee in bankruptcy has the rights of an attaching creditor, but this case arose prior to the amendment of the Bankruptcy Act of June 25, 1910, which gives the trustee the rights

of a judgment creditor holding an unsatisfied execution, and the trustee's rights prior to that amendment were not those of an attaching creditor, unless there was in fact such a creditor.

York Manufacturing Co. *v.* Cassell, 201 U. S. 344;
III Remington on Bankruptcy, pp. 283, 284.

Even if the trustee did occupy the position of an attaching creditor, he would still be subject to titles and estoppels valid as against the debtor.

Morrison *v.* Caldwell, 17 Am. Dec. 84 at 92;
Taylor *v.* Agric. Assn., 68 Ala. 228 at 239;
Kimball *v.* Blaisdell, 5 N. H. 533;
Tefft *v.* Munson, 57 N. Y. 97;
16 Cyc. 716.

In his application for certiorari the petitioner referred to §4287 of the Code of Alabama, reading as follows:

"All deeds of gift, all conveyances, transfers and assignments, verbal or written, of goods, chattels or things in action, made in trust for the use of the person making the same are void against creditors, existing or subsequent, of such person."

The contention seems to be that the retention by the bankrupts of the genuine bills of lading was a retention of an interest in the property such as to make the spinners' title fraudulent under the statute. The statute is, however, wholly inapplicable. Its purpose is to make voidable conveyances where the real object is to put the

property conveyed beyond the reach of creditors while retaining a beneficial interest in the grantor.

Howell *v.* Carden, 99 Ala. 100 at 111;
Crawford *v.* Kirksey, 55 Ala. 282.

The statute makes void conveyances where the grantee takes only a colorable title and permits the grantor to remain the real owner,—in other words, where the grant is merely a device to defeat other creditors, and where, to use the phrase of the Court in Howell *v.* Carden, 99 Ala. 100, at 111, the grantee intends "to aid the debtor in holding his property against his other creditors." Obviously, there is nothing of this sort in the present case.

Retention of possession by the grantor is always open to explanation.

Mayer *v.* Clark, 40 Ala. 259 at 269;
Ullman *v.* Myrick, 93 Ala. 532.

There was no such colorable conveyance here. On the contrary, the finding of the Circuit Court is that the bankrupts' intent was to pass title, not to retain it, and to make a real conveyance, not a colorable one. The Circuit Court found that the genuine bills of lading were retained not in order to keep title but in order to suppress them and conceal the fraud. This finding is conclusive here. The Alabama statute, which is now referred to for the first time in this litigation, has not the remotest bearing on the case.

There was, then, no attaching or judgment creditor, no claim of voidable preference, no fraudulent conveyance, and no transaction void as against creditors under state laws. The trustee,

in consequence, stands in the shoes of the bankrupts, exactly as alleged by the plaintiff in error in his petition in the Circuit Court. In the following pages it will be shown that the bankrupts could have not asserted any title to the cotton in suit as against the spinners.

## II.

THE SHIPMENT OF THE COTTON WAS AN APPROPRIATION OF IT TO THE CONTRACTS OF PURCHASE AND TO THE FIRST SET OF BILLS OF LADING, AND TITLE PASSED TO THE SPINNERS IMMEDIATELY UPON SHIPMENT.

It is of course well settled that in the ordinary transaction where goods are to be shipped by a vendor to a vendee title passes upon shipment.

Williston, Sales, pp. 398-400.

In United States *v.* Andrews, 207 U. S. 229, at 240, this Court said:

"That, where a purchaser of goods directs their delivery for his account to a designated carrier, the latter becomes the agent of the purchaser and delivery to such carrier is a legal delivery to such purchaser, is also beyond question."

The contract in this case called for shipment to Genoa c. i. f. This means that the contract price included the cost of the cotton and also the cost of insurance and freight. It is well settled that under such contracts the seller's duty is performed by shipping the goods, and that title

thereupon passes, unless some contrary intent is manifest.

Williston, Sales, p. 408.
Mee v. McNider, 109 N. Y. 500.
Bowden Bros. v. Little, 4 Comm. 1364.
Tregelles v. Sewell, 7 Hurls. & N. 574.

It is further clear that, if the transaction had been honestly carried out, title would have passed to the spinners at shipment, subject to a lien in favor of the bankers to whom the drafts with bills of lading attached had been sold, and that this lien would have been extinguished as soon as the drafts had been accepted and the bills of lading delivered to the spinners. If, then, the transaction had been honestly carried out, title, subject to the banker's lien, would have been in the spinners from the time of shipment, and complete title would have vested in them as soon as they had accepted the drafts and received the indorsed bills of lading.

Concededly the forged bills of lading and documents thereto attached were intended by Knight, Yancey & Company to induce the spinners to believe that the cotton had been shipped. It is also conceded that this design was carried out, and that the spinners, deceived by the documents, paid the drafts which had been negotiated by Knight, Yancey & Company. The position then was that the spinners had paid for the cotton, but that Knight, Yancey & Company had not yet shipped it. Matters being in this condition, Knight, Yancey & Company shipped the exact quantity of cotton which the forged bills purported to represent, each lot being of precisely the grade called for by the respective contracts. The cotton and the

genuine bills of lading bore exactly the same marks which had been placed on the forged bills and on the invoices, drafts and insurance certificates which accompanied them, and these marks were in each case applied to the same quantity and grade of cotton, designed for the same spinner. The cotton was shipped under the precise routing which the contract of purchase called for and which the forged bills purported to evidence. Even the statement of the weight of each lot of cotton was the same on the forged and genuine bills. They were dated at the same places, signed with the same names, and were on the same railroad forms. It is perfectly plain that this was a shipment of the cotton which had already been paid for, and that its purpose was to carry out the contracts and to conceal the fraud.

In further pursuance of this design, Knight, Yancey & Company retained the genuine bills of lading, and did not endeavor to raise money on them, but suppressed them and concealed them from the receivers and the trustee, as is shown by the petition in the District Court (Record, p. 130), which alleges that the genuine bills had been "either destroyed or made away with." As appears by the statement of facts, paragraph 9 (Record, pp. 48-49), it was not until some time after May 26, 1910, about six weeks after the bankruptcy, that the trustee was able to secure these genuine bills.

It is, therefore, plain that the intent of Knight, Yancey & Company was to ship the cotton in pursuance of the contracts; to have title pass, in accordance with the contracts, on shipment; and to suppress the genuine bills in order to conceal the fraud. The Circuit Court, in view of these facts, found that such was Knight, Yancey & Company's

intent and that title passed upon shipment by appropriation, in accordance with the rule applied by this Court to similar facts in the case of Hentz *v.* The *Idaho*, 93 U. S. 575.

## III.

### Estoppel.

The principles of estoppel apply as against the trustee in two ways:

(1) By the forged bills and the endorsement and delivery of them, Knight, Yancey & Company represented that they owned certain cotton therein described, and that they thereby conveyed it as therein stated to the spinners. It is well settled that on a sale of personal property the vendor is held to be a warrantor of his title and right to convey.

> Tiffany on Sales, p. 165;
> Benjamin on Sales, 5th Ed., p. 598.

It is also a familiar principle that where a grantor sells property in which he has in fact no interest, and warrants the title, any subsequently acquired title enures to the benefit of the vendee without any further instrument of conveyance. The doctrine is well stated in the case of Faulks *v.* Kamp, 3 Fed. Rep. 898, where it is said:

"Every seller of personal property impliedly warrants that he has title to and right to sell what he assumes to sell. His undertaking to sell in-

cludes an undertaking to that effect. * * * It is a familiar law, and has been for a long time, that a warranty of title or right draws to it any after-acquired right or title of the warrantor, and carries it to the benefit of the person to whom the warranty runs. So whatever right, if any, the defendants acquired to the invention covered by this patent enured directly to the benefit of the orators. * * * But the rights of the orators do not rest upon the estoppel merely; they rest upon the purchase, which must operate so that the orators may have what they bought, and so that the defendants *shall not both sell and keep the same thing.*"

To the same effect, Sherman *v.* Champlain Trans. Co., 31 Vt. 162.

When, therefore, Knight, Yancey & Company acquired the cotton and identified it with that described in the forged bills, by marking with the same marks the same quantity and quality of cotton, segregating it, and shipping it, title passed.

(2) Knight, Yancey & Company and the trustee, as their successor, are *estopped to deny the genuineness of the forged bills.* These bills were put forward as genuine, with intent to deceive the spinners, who did in fact rely upon them and pay their money on faith of the representations therein contained. The trustee cannot now dispute the genuineness of the forged bills.

> Layson *v.* Cooper, 174 Mo. 210 at 221;
> Kelly v. Scott, 49 N. Y. 595.

The forged bills may therefore be considered as genuine bills issued in advance of the receipt of cotton by the carrier. When the cotton was thereupon shipped, the shipment was an appro-

priation of it to these previously issued bills. This is squarely decided in

Hentz v. The *Idaho,* 93 U. S. 575.

Title to the cotton thereupon passed to the spinners. This is also decided by The *Idaho.* The issue by the carrier of a second set of bills of lading is immaterial where, as here, no rights of third parties are involved.

Moreover, Knight, Yancey & Company and their trustee are estopped to deny that the carrier received the cotton at the time when the forged bills state. By negotiating those bills they represented that on certain dates certain lots of cotton, bearing certain marks and routed in a certain way, were delivered to a certain carrier. At the time of the adjudication, precisely those lots of cotton were in the hands of that carrier. The trustee cannot deny that this was the cotton which the bankrupts represented had been shipped, and cannot deny that the carrier held it under the forged bills of lading on which the spinners had relied.

In re McKay & Aldus, 1 Lowell 345;
In re Pease Car & Locomotive Works, 134 Fed. 919;
Aldine Trust Co. v. Smith, 182 Fed 449.

In the last case a trustee in bankruptcy was held estopped by representations made by the bankrupts to the effect that certain money was due to them.

Looking at the matter from another standpoint, the forged bills and the genuine bills may as between the parties, be regarded as *duplicate* bills of lading. Plainly a shipper cannot sell one of two duplicate bills to a bona fide purchaser, and there-

after claim title in himself as against that purchaser by virtue of the second duplicate bill which he retains.

See, too, the case of Conard v. Atlantic Ins. Company, 1 Peters 386, where it was held that goods under bill of lading may be assigned by a separate instrument, and that the title so passed is good against all persons except bona fide purchasers of the bill of lading. In accordance with this principle, the forged bills, with their endorsements, were conveyances by Knight, Yancey & Company to the spinners of certain lots of cotton therein described. These lots of cotton were subsequently identified by marking and shipment, whereupon the conveyance became operative, there being no innocent third person involved.

The Circuit Court found that the trustee was estopped by the facts above recited to claim any right, title or interest to the cotton in question, and this finding cannot be challenged. The intervention of the spinners raises the estoppel in its most acute form. They were the persons deceived, and when they invoke the estoppel it is submitted that it cannot be evaded.

## IV.

### The Trustee's Argument.

1. It is argued that because Knight, Yancey & Company retained the genuine bills of lading, reading to shippers' order, therefore they retained title. It is of course perfectly settled that

the form of the bill of lading is only prima facie evidence of title and is open to explanation.

> The Carlos F. Roses, 177 U. S. 655 at 665;
> Porter on Bills of Lading, §489.

The question is always one of intent of the parties as to when title shall pass, and it presents a question of fact for a jury.

> Bradford *v.* Marbury, 12 Ala. 520;
> Dows *v.* National Exch. Bank, 91 U. S. 618;
> Joyce *v.* Swann, 17 C. B. N. S. 84.

This question of fact as to the intention has been conclusively settled by the finding of the Circuit Court that the intention was to appropriate the goods, pass title, and suppress the genuine bills.

The argument that so long as Knight, Yancey & Company had the genuine bills they *might have* made a sale to a third party is obviously of no weight, so long as they *did not* do so. It is doubtful, under the decision in *The Idaho,* 93 U. S. 575, whether even a bona fide purchaser would get title as against the spinners. But assuming that he would, the question does not arise in this case, and the trustee certainly cannot claim title by arguing that the bankrupts had it in their power to commit a second fraud by selling the genuine bills to a third party. He cannot establish title by claiming the fruits of a potential fraud.

It is also argued that, if Knight, Yancey & Company had it in their power to make such a sale of the genuine bills to a bona fide third party, the cotton was property which they could by some means have transferred, within the mean-

ing of Section 70a (5) of the Bankruptcy Act. That section, however, refers to *lawful* transfers and not to dishonest and fraudulent ones.

Collier, Bankruptcy, 8th ed., p. 815.

Many cases might be imagined where a person has the *power* to pass title to property belonging to someone else. It does not follow that the trustee in bankruptcy of such a person takes title to such property. So in this case, the wrongful holders of the genuine bills of lading had no right, as against the true owners, to control the delivery or destination of the goods in the hands of the carrier.

Moreover, section 70a of the Bankruptcy Act gives the trustee only the *title of the bankrupts.* It is plain that the bankrupts had no title as against the spinners.

2. It is further suggested by the trustee that the goods were not shipped in the months when the contracts provided for shipment, and it is said that this fact prevents the passage of title. The answer is two-fold,—that, as already seen, the trustee is estopped to assert that the goods were not shipped in the months called for by the contracts, after having represented the contrary in the forged bills; and that in any case the provision as to time of shipment was one for the benefit of the vendee, and the vendor, who himself failed to comply with this provision, cannot set up his own breach of duty as the basis for claiming title to the property. It is fundamental that no one shall be allowed to take advantage of his own wrong.

Gumbel *v.* Pitkin, 124 U. S. 131 at 147;
Risley *v.* Smith, 64 N. Y., 576, at 582.

No authorities have been cited by the trustee and none can be cited, because they do not exist, which allow a vendor who is himself in default to set up that default in his own favor as the basis of a claim that title has not passed as against a vendee who claims that it has.

Williston, Sales, p. 242.

In Smith *v.* Peyrot, 201 N. Y. 210, the Court said, p. 214:

"It is a familiar principle that one cannot avail himself of the failure to observe a condition precedent who has himself occasioned the non-performance."

And in Redlands Orange Growers *v.* Gorman, 76 Mo. App. 184, (affirmed 160 Mo. 203), the Court said, at p. 190:

"Where time is made the essence of a contract, delay beyond the stipulated time in shipment or delivery of goods does not preclude the vendee from accepting them."

Other instances of the application of this doctrine to contracts of sale where the vendor has been guilty of a breach of warranty are

Arkwright Mills v. Aultman Co. 145 Fed. 783, at 785.

Andrews v. Schreiber, 93 Fed. 367; 101 Fed. 763, at 766.

Undoubtedly the breach of agreement as to the time of shipment by Knight, Yancey & Company would have enabled the spinners to reject the goods and rescind title, but Knight, Yancey & Company and their trustee cannot set up this breach in their own favor.

It is further claimed that in view of the breach as to time of shipment already noted, title would not pass by virtue of the contract of sale, but that a new offer and acceptance would be necessary. The law, however, is well settled to the contrary.

Eastern Granite Roofing Co. v. Chapman & Co., 140 Ala. 440 at 443;
Foley *v.* Felrath, 98 Ala. 176 at 180;
Andrews v. Schreiber, 93 Fed. 367, (affirmed 101 Fed. 763);
Bacon v. Cobb, 45 Ill. 47, 56-57;
Williston, Sales, p. 1085.

All the above authorities hold that title passes by virtue of the original contract and that the right of the vendee is, if he desires, to reject the goods and rescind the title. Indeed, the assent of the vendee to take the goods is assumed as matter of law, where it is plainly to his own advantage to take them.

Grove v. Brien, 8 How. 429.

The same arguments which have been made in regard to the delay in shipment apply to the alleged failure to insure. If the goods were not insured when shipped, it was a breach of duty on the part of Knight, Yancey & Company, and neither they nor their trustee can take advantage of that fact. Also, they are estopped to assert that the goods were uninsured.

As a matter of fact, moreover, it is believed that the goods were insured, for the insurance certificates attached to the forged bills simply cover certain quantities of cotton bearing certain marks, and to be shipped by a certain route.

There is nothing in the certificate which states when they were shipped, and there is no reason for doubting that the insurance covered the real cotton when it was shipped.

The authorities cited by the trustee in the lower courts and on his application for certiorari have been cases for the most part where the *vendee has refused to take title* in consequence of a breach of warranty or condition by the vendor, and where the courts have held that he cannot be *forced* to take title. Obviously these authorities have no bearing on the present case. Other cases involving the rights of innocent third parties have also been cited by the trustee, but it is equally plain that such cases have no application, since there is no innocent third party in the present case. The trustee has relied particularly on the cases of Sneathen *v.* Grubbs, 88 Pa. 147, and Belding-Hall Mfg. Co. v. Mercer-Ferdon Lumber Co., 175 Fed. 335. In both these cases the contracts provided for delivery to the buyer at a certain point, and in neither case had the act of delivery been performed. In the case at bar the act of delivery, namely, the shipment, had been performed.

The trustee's authorities are discussed at some length at pp. 63-69 of the brief submitted in opposition to the petition for certiorari.

## V.

### Preference.

Some argument has been made in the briefs heretofore submitted by the trustee to the effect

that if the title be adjudged to be in the spinners, they are receiving a preference. It has already been pointed out this is not a suit to avoid a preference and therefore no discussion of the subject is relevant. But it is plain that there was no preference, for the spinners had not the slightest ground for believing that Knight, Yancey & Company were insolvent, nor did they ever intend to extend credit to Knight. The sale of the cotton was a sale for present consideration, and none the less so because of fraudulent delay in delivery.

## VI.

### Conclusion.

It is submitted that, while the fraud committed was of an unusual character, the questions on which the title to the cotton in suit depend are very simple. The trustee stands in the shoes of Knight, Yancey & Company. It is perfectly plain that Knight, Yancey & Company could never have claimed this cotton as against the spinners. They had shipped it with the intent to pass title and had suppressed the genuine bills of lading. Title thereupon passed. Certainly Knight, Yancey & Company could never have based a claim against the spinners on the fact that they themselves had failed to ship the cotton in time, or to insure it; nor on the fact that the bills of lading which they had put forward as genuine were in fact forged.

The trustee's whole case rests upon the fraud of the bankrupts. If it were not for the fraud, it

could not be disputed that title passed on shipment. Every argument that the trustee makes rests ultimately on the fact that the bankrupts had been guilty of fraud; and a trustee in bankruptcy, the officer of a court of equity, is the last person who should be heard to attack the spinners' title on the ground that the bankrupts had committed a fraud, and to ask the Court's aid to consummate the fraud by defeating the bankrupts' attempt at reparation. The fraud is not an asset in the trustee's hands.

Zartman *v.* First National Bank, 216 U. S. 134, at 138.

Even the bankrupts expected the spinners to pay for the cotton only once. The trustee wants them to do so twice.

It is submitted that, even if the Court has jurisdiction of the case, the decision is so plainly just and in accordance with law that the motion to affirm should be granted.

New York, December 17, 1912.

EVERETT P. WHEELER,
JOHN W. GRIFFIN,
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27 William Street,
New York City.

IN THE SUPREME COURT OF THE UNITED STATES. NO.———

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THE PETITION OF WILLIAM S. LOVELL, TRUSTEE IN BANKRUPTCY OF KNIGHT, YANCEY & COMPANY, FOR A WRIT OF CERTIORARI DIRECTED TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, TO BRING BEFORE THE SUPREME COURT THE CASE OF

WILLIAM S. LOVELL,
Trustee in Bankruptcy of Knight, Yancey & Company,
*Plaintiff in Error,*

vs.

ISIDORE NEWMAN & SON, J. K. NEWMAN, E. A. NEUGASS, AND WIDOW ISIDORE NEWMAN,
*Defendants.*

THE COTONIFICIO CANTONI; THE COTONIFICIO FURTER; THE MANIFATURA TOSI; GIANOLI BROS.; A. BERNOCCHI BROTHERS,
*Intervenors.*

} Defendants in Error

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W. A. BLOUNT,
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Attorneys for William S. Lovell, Trustee in Bankruptcy of Knight, Yancey & Company, Petitioner.

TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA

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The petition of William S. Lovell, Trustee in Bankruptcy of Knight, Yancey & Company, for a writ of certiorari directed to the Circuit Court of Appeals for the Fifth Circuit, to bring before the Supreme Court the case of

WILLIAM S. LOVELL,
Trustee in Bankruptcy of Knight, Yancey & Company,
*Plaintiff in Error,*

vs.

ISIDORE NEWMAN & SON, J. K. NEWMAN, E. A. NEUGASS, AND WIDOW ISIDORE NEWMAN,
*Defendants.*

THE COTONIFICIO CANTONI; THE COTONIFICIO FURTER; THE MANIFATURI TOSI; GIANOLI BROS.; A. BERNOCCHI BROTHERS,
*Intervenors.*

} Defendants in Error

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The petitioner, William S. Lovell, as Trustee in Bankruptcy of Knight, Yancey & Company, as a basis for the order hereinafter prayed, respectfully shows to the court as follows:

I.

Knight, Yancey & Company, a partnership doing business at Decatur, Alabama, and composed of John W. Knight, a resident of Decatur, Alabama; William D. Nes-

bitt, a resident of Birmingham, Alabama; Robert H. Nesbitt, a resident of Spartanburg, South Carolina, and William J. Yancey, a resident of Memphis, Tennessee, were duly adjudicated bankrupts by the District Court of the United States for the Northern District of Alabama, Northeastern Division, on April 20, 1910, and thereafter on May 26, 1910, petitioner, a resident of Birmingham, Alabama, was appointed Trustee in Bankruptcy of the bankrupt estate of Knight, Yancey & Company, and duly qualified.

II.

The petition for the adjudication in bankruptcy of Knight, Yancey & Company was filed on April 20, 1910, and on April 21, 1910, Clarence E. Frost, a resident of Athens, Alabama, and William S. Lovell, a resident of Birmingham, Alabama, were appointed Receivers of the estate of Knight, Yancey & Company by the bankruptcy court aforesaid.

III.

At the time Knight, Yancey & Company were adjudged bankrupts, there were in process of shipment, among others, 1,311 certain bales of cotton which had been shipped by them at intervals between March 16, 1910, and April 11, 1910, both inclusive, over the Southern railway and a connecting steamship line from points in Alabama to Genoa, Italy, which cotton was by the terms of the bills of lading issued by the Southern Railway Company therefor, consigned to the order of Knight, Yancey & Company at Genoa, Italy.

IV.

On May 3, 1910, the 1,311 bales of cotton above mentioned were found by said Receivers in Bankruptcy to be at the port of Chalmette, in Louisiana, about to be shipped out of the United States on the steamship Ingelfingen, and thereupon said Receivers in Bankruptcy filed their

petition in the District Court of the United States at New Orleans against the steamship Ingelfingen and the New Orleans Terminal Company, in the possession of one or the other of wh[illegible]aid cotton was, praying an injunction against the removal of said cotton from the United States, and setting up that the cotton was the property of the bankrupt estate and properly to be administered in bankruptcy. In response to notice served on him of these proceedings, the master of the steamship Ingelfingen appeared and objected to the issue of the injunction prayed for. The District Court of the United States at New Orleans, after a hearing on the motion of the Receivers in Bankruptcy for an injunction, ordered the injunction to issue upon the Receivers entering into bond, but further provided by the order that the cotton might be removed from the jurisdiction of the court by said steamship provided a bond should be given by the respondents to the petition, or either of them, or other parties in interest, for the value of the cotton, conditioned upon the payment of the principal sum thereof, or such part thereof as the court might direct, to the Receivers or Trustee in Bankruptcy of Knight, Yancey & Company, if in a suit or action at law or in equity that might thereafter be brought in the Circuit or District Court of the United States for the Eastern District of Louisiana by the Receivers in Bankruptcy of Knight, Yancey & Company, or the Trustee or Trustees in Bankruptcy of Knight, Yancey & Company, against the surety on said bond, it should be adjudged that the Receivers or said Trustee or Trustees had the right, title or interest in or to said cotton or any part thereof. The master of the steamship gave the bond provided for by said order, with Isidore Newman & Son, residents of New Orleans, Louisiana, as sureties thereon, and the cotton was removed. Said bond was in the sum of $98,500, which approximated the value of the 1,311 bales of cotton.

V.

After petitioner's appointment as Trustee in Bankruptcy of Knight, Yancey & Company, the bankrupts de-

livered to him, duly endorsed, the Southern Railway Company's bills of lading for the 1,311 bales of cotton, and thereupon he, as such Trustee, brought his suit in the Circuit Court of the United States for the Eastern District of Louisiana against Isidore Newman & Son and the partners composing the firm, the sureties on the bond aforesaid, setting up the proceedings in which said bond was given, and averring that the cotton aforesaid belonged to said bankrupt estate, and praying judgment on said bond for the value of the 1,311 bales of cotton. The suit so brought was defended by Isidore Newman & Son on the ground that the cotton was not the property of the bankrupt estate, but was the property of certain Italian spinners whose names are mentioned in the caption of this petition as the intervenors. These Italian spinners were either partnerships or corporations, and were all citizens of Italy, and after the case was at issue they were, upon their application, allowed by the court to intervene and make defense. A jury was waived and the case was tried on an agreed statement of facts which showed in substance the following state of facts:

a. The 1,311 bales of cotton at the time of shipment belonged to Knight, Yancey & Company and were consigned to their own order at Genoa, Italy, under through bills of lading issued by the Southern Railway Company, which bills of lading were retained by Knight, Yancey & Company and, duly endorsed in blank, were delivered to their Trustee after his appointment as aforesaid.

b. At sundry dates, in December, 1909, and January, 1910, Knight, Yancey & Company had entered into executory contracts for the sale to the Italian spinners of lots of cotton as follows:

| | |
|---|---|
| To Gianoli Bros. | 200 bales |
| To Antonio Bernocchi & Bros. | 300 bales |
| To Est. Manifattura Tosi | 600 bales |
| To Est. Manifattura Tosi | 500 bales |
| To Est. Furter Cotton Mills | 500 bales |
| To Est. Contoni Cotton Mills | 900 bales |
| To Est. Contoni Cotton Mills | 300 bales |
| To Est. Contoni Cotton Mills | 100 bales |

These contracts were all c. i. f. contracts, that is to say costs, insurance and freight to be paid by the seller, and called for the shipment of the cotton in the months of January and February, 1910, and provided that the cotton should be shipped under a "Liverpool Conference" bill of lading, and for the reimbursement of the shippers by drafts on the bankers of the various spinners.

c. Upon closing said executory contracts of sale, Knight, Yancey & Company, between January 18 and February 1, 1910, through John W. Knight, the managing partner of said firm, forged thirteen bills of lading, which purported to be the bills of lading of the Southern Railway Company, eleven of them calling for the transportation of one hundred bale lots of cotton each, and two of them calling for the transportation of one hundred and fifty bale lots of cotton each, from either Decatur, Alabama, or Selma, Alabama, to Genoa, Italy, over the line of the Southern Railway to New Orleans, Louisiana, and thence by steamship to Genoa, Italy. In said bills of lading, the lots of cotton purported to be called for thereby were indicated as being of certain marks and of certain weights. Simultaneously with the forging of said bills of lading, Knight, Yancey & Company, acting through John W. Knight, drew drafts, which purported to be for the purchase price of said lots of cotton, on the bankers of the spinners severally, and attached them, together with insurance certificates on lots of cotton in number of bales and of marks corresponding to the number of bales of the marks called for in said forged bills of lading severally, to said forged bills of lading, which were endorsed in blank by the bankrupts, which drafts went forward for collection through various banks, and in due course were presented for acceptance to the bankers of the spinners and were duly accepted; and thereupon the forged bills of lading were delivered to the spinners severally; and thereafter the drafts were paid. Upon the drawing of said drafts, they were discounted by Knight, Yancey & Company, and approximately the amounts of money called for in their face were obtained by them. There was no communication of any kind between the said Ital-

ian spinners and the bankrupts between the time the contracts of sale were made and the time of the adjudication in bankruptcy.

d. The cotton which was seized as aforesaid bore marks which corresponded with the marks contained in said forged bills of lading and the drafts to which the forged bills of lading were attached each contained a phrase as follows: "Value received and charge same to account of one hundred TSXS bales of cotton;" the four capital letters occurring in said phrase being different in each draft, and corresponded with what purported to be the marks of the cotton contained in the forged bills of lading. As before stated, these 1,311 bales of cotton were shipped by Knight, Yancey & Company at intervals between March 16, 1910, and April 11, 1910, all of said shipments being made from six weeks to two months after the forging of the bills of lading referred to and the negotiation of the drafts to which they were attached, and also after the time prescribed for shipment in the executory contracts of sale referred to.

VI.

Upon the submission of the case to the Circuit Court, the Circuit Court held that the thirteen hundred and eleven bales of cotton had become the property of the Italian spinners, who held the forged bills of lading containing marks corresponding with the marks on the cotton, and held that Knight, Yancey & Company had appropriated the cotton to the contracts of sale made with said spinners, and that they and their Trustee in Bankruptcy were estopped to deny that the title to the cotton had passed to the spinners, and gave judgment for the defendants.

VII.

Thereupon, petitioner, the Trustee in Bankruptcy of Knight, Yancey & Company, sued out a writ of error to the Circuit Court of Appeals, Fifth Circuit, which was

duly allowed; and, said case being submitted to said Circuit Court of Appeals, it affirmed the judgment of the Circuit Court; its holding on the questions involved being the same as that of the Circuit Court. The opinion of the Circuit Court is reported in 188 Federal Reporter 534, and the opinion of the Circuit Court of Appeals is reported in 192 Federal Reporter 753.

## VIII.

Thereafter, on, to-wit: February 28, 1912, petitioner, the Trustee in Bankruptcy aforesaid, sued out a writ of error from said Circuit Court of Appeals to the Supreme Court. Petitioner's counsel in suing out said writ of error, acted on the opinion that the judgment of the Circuit Court of Appeals was not final, and that the case would be reviewed by the Supreme Court, on the ground that the jurisdiction of the Circuit Court did not depend solely on diversity of citizenship, but that there were two other grounds of federal jurisdiction patent upon the face of the petition: the first being that the suit arose under the laws of the United States, in that the suit was on a bond given in a Federal Court pursuant to a decree of that court; and the second being that the defendants in the proceeding in which said cotton was seized not only consented to be sued, but actually stipulated that they should be sued in the Federal Courts by a Trustee in Bankruptcy to recover assets of the bankrupt estate, so that by the terms of Section 23-b of the Bankruptcy Act, the Federal Courts had jurisdiction of the controversy by consent.

This writ of error has been perfected and the record returned into the Supreme Court. Petitioner's counsel, however, deem the question of the right of petitioner to have this case reviewed by the Supreme Court as a matter of right, attended with some doubt especially in view of the threatened purpose of the defendants in error to move for a dismissal of the appeal, and the case being one of great importance both on account of the novel questions presented as well as the bearing a decision of it has upon the question of title to nearly a million dollars'

worth of cotton involved in this and kindred litigation growing out of the failure of the cotton exporting firms of Knight, Yancey & Company and Steele, Miller & Co., deem it proper to present to the Supreme Court this petition for a writ of certiorari directed to said Circuit Court of Appeals.

IX.

The questions of law involved in this case are substantially as follows: The bankrupts, having shortly prior to their adjudication in bankruptcy, shipped cotton, which belonged to them at the time of such shipment, under bills of lading by the terms of which the cotton was deliverable to their own order, which bills of lading were retained by them—did they part with the title to such cotton because they had previously entered into contracts for the sale of a similar quantity of cotton to persons on whom they had previously drawn drafts, to which were attached forged bills of lading purporting to call for a similar quantity of cotton, of the same marks and weight, which drafts had been accepted and paid, such persons at the time bankruptcy intervened being ignorant both of the fact that they had been defrauded and of the existence of the cotton in question?

X.

Is the Trustee in Bankruptcy estopped to deny that such cotton in transit, which belonged to the bankrupts at the time of shipment and for which they held the bills of lading, belonged to such persons so defrauded?

XI.

Could such persons so defrauded claim such cotton on discovering it after the bankruptcy, although they were ignorant of its existence or the fact of its shipment prior to the bankruptcy?

XII.

Did the bankrupts by retaining the bills of lading for the cotton which was deliverable to their order retain the *jus disponendi* of the cotton?

XIII.

Will cotton shipped in the months of March and April and uninsured against loss by fire, perils of the sea, etc., be held to have been appropriated by the bankrupts to the fulfillment of contracts of sale which called for the shipment of cotton in the preceding months of January and February, and which also called for insurance to be effected by and at the cost of the sellers for the benefit of the buyers, the purchaser being ignorant of the shipment and of the changes in time, conditions, etc., aforementioned, until after the bankruptcy of the sellers?

Under these circumstances, can there be an appropriation which in effect means delivery and in turn a transfer of title, and, therefore, a transfer of risk, to the buyers when the buyers had no knowledge, until after the bankruptcy of the sellers, of the variations and changes in their contracts, which variations and changes might have resulted to their serious injury and detriment?

XIV.

Will such cotton be held to have been appropriated by the bankrupts to the fulfillment of executory contracts for the sale of cotton which called for the reimbursement of the shippers on drafts to which were attached bills of lading?

XV.

Can persons who were defrauded, as aforesaid, elect after the bankruptcy to treat the cotton as appropriated by the bankrupts to the contracts of sale, pursuant to which they had paid drafts to which they believed were

attached bills of lading calling for the cotton purchased under such contracts of sale?

## XVI.

Your petitioner avers that the present case is one in which it is proper for this court to issue a writ of certiorari for the following, among other, reasons:

1. Knight, Yancey & Company, the bankrupts, for five years or more prior to the bankruptcy, had been largely engaged in the exporting of cotton from the United States and its sale to importers who were citizens of Great Britain, France, Germany, Italy and other foreign countries. At the time Knight, Yancey & Company were adjudicated bankrupts, they had defrauded citizens of these foreign countries, and principally subjects of Great Britain, of approximately four million dollars by means of forged bills of lading issued and negotiated after substantially the same scheme as that detailed in this petition. This sum of money had been obtained under the belief of the persons who parted with it that they were paying for cotton purchased of Knight, Yancey & Company in approximately the amount of fifty thousand bales. At the time of their bankruptcy, there were in process of shipment approximately ten thousand bales of cotton which had been purchased with what had not been squandered by Knight, Yancey & Company of the sum of approximately four million dollars fraudulently obtained by them as aforesaid. All of this cotton in process of shipment at the time of Knight, Yancey & Company's bankruptcy is involved in litigation between claimants thereof and the Trustee in Bankruptcy of Knight, Yancey & Company, the claimants thereof asserting title thereto under a state of facts substantially the same as that set up by the defendants in the instant suit, and the claim of petitioner, the Trustee acting in behalf of all creditors, to said cotton being substantially the same as that asserted in this case.

The claims which have been proven in bankruptcy against the estate of Knight, Yancey & Company are all,

substantially, the claims of persons who were defrauded of their money by means of forged bills of lading purporting to be for cotton purchased from said firm of Knight, Yancey & Company by such persons, whose money went into the hands of the bankrupts, and the remnant of it not squandered by the bankrupts into the purchase of the cotton involved in this suit, and in other suits, and three-fourths or more in amount of such creditors are residents of foreign countries, including Great Britain, France, Italy and Germany.

If all of the cotton in process of shipment at the time of the bankruptcy were recovered by the Trustee and administered by him for the benefit of the creditors of the bankrupt estate, the estate would declare a substantial dividend for all its creditors. If, on the other hand, it is held that the cotton in process of shipment at the time of the bankruptcy belonged to the persons who held forged bills of lading with marks therein corresponding to the marks on the actual cotton, the estate will pay merely an inconsiderable dividend.

The same questions involved in this case are involved in litigation growing out of the bankruptcy of Steel, Miller & Company, a concern which was practicing frauds similar to those described herein.

The questions involved are, therefore, of international interest and importance, and have attracted attention in all the cotton importing centers of Europe.

2. The questions herein involved are novel and have not heretofore been passed on by this court. The same questions of law involved in this case are involved in the case of William S. Lovell, Trustee in Bankruptcy of Knight, Yancey & Company, plaintiff in error, against Henry Hentz & Company, defendant in error, lately decided by the Circuit Court of Appeals for the Fifth Circuit, to bring up which upon a writ of certiorari a petition has been filed in this court similar to this petition, it having been appealed on the same grounds, in part, involved in this appeal.

3. The case involves a very important question of bankruptcy law, which this court should settle. The

Circuit Court of Appeals has decided that if the title to the cotton passed as against the shippers, it passed as against the Trustee in Bankruptcy. In this it purported to follow the general doctrine that a Trustee in Bankruptcy stands in the shoes of the bankrupt; but we submit that it ignored Section 70-a, Subdivision 5, of the Bankrupt Law, which provides that there shall be vested in the Trustee, by operation of law, all property which, prior to the filing of the petition, might have been levied upon and sold under judicial process against the bankrupt. The court below has, we submit, misapplied the doctrine in the cases of

York Manufacturing Co. vs. Cassell, 201 U. S. 344, and
Security Warehousing Co. vs. Hand, 206 U. S. 415,

and refused to apply the above mentioned provision of Section 70-a.

As we understand, the former case decided that a lien created by a person subsequently becoming bankrupt, and good as against him, though not recorded, was good as against the Trustee, because the State law made it void only as against creditors who had fastened a lien upon the property, and there were no such creditors.

And the latter case decided that when the State law made such a lien invalid, as against even general creditors, and there were such general creditors, the Trustee would take the property, divested of such lien. We understand these two cases to declare the doctrine that whenever there is a class of creditors against whom a transfer or lien is void, the property is subject to levy under judicial process, and passes to the Trustee in Bankruptcy, and that this is true whether the rights of the general creditors are declared by a State law, or whether they arise out of the common law. In the instant case, if our contention that a delivery of the cotton at a time subsequent to that required by the contract, and without insurance or a bill of lading, failed to constitute an effective delivery in the law, as against the creditors, then,

even though it might be good by subsequent ratification as to the bankrupt, it would not prevent the property from being subject to levy under judicial process, and, therefore, the title from passing to the Trustee. The Circuit Court of Appeals has, in effect, declared that this would be true only when there was a statute, and it is important that this court should clearly say whether a statute was necessary, or whether a delivery, not effectual under the common law as to creditors, is good as against the Trustee.

The court below also decided that although an appropriation by a person (who thereafter became bankrupt) of personal property to an antecedent executory contract of sale, was not in accordance with that contract as to time of delivery, and as to other essentials, yet that the executory buyer may, after the bankruptcy and after the appointment of a Trustee, accede to and ratify such an appropriation, and thus cause the title to vest in himself by relation, as of the time of the appropriation, and thus defeat the title which would otherwise have vested in the Trustee. If this be the law, then it gives the creditor who obtains, *after the bankruptcy*, knowledge of the insolvency of his debtor, and then by his own will obtains property which comes to him with the full knowledge of insolvency, a vast advantage over creditors who, by the like will and with the like knowledge *before bankruptcy*, obtain the like property. And if this be the law, it enables the debtor to defeat the law of voidable preferences, by transferring his property to a creditor without the consent of the creditor obtained before bankruptcy, knowing that if the consent be obtained after bankruptcy, the transfer would be valid.

It behooves this court to declare the law upon this point, with the greatest clearness, for the loop-hole given by the decision of the Circuit Court of Appeals will be often availed of, and this court should declare whether the transfer shall be effective or ineffective.

In Belding Hall Manufacturing Co. vs. Mercer & Ferdon Lumber Co., 175 Fed. Rep. 338, the Court of Appeals for the Sixth Circuit, Lurton, Judge, being the or-

gan of the court, was called upon to deal with a case very similar to the one here under discussion, and that court held that there could be no appropriation and delivery with the consequent transfer of title and of risk—as against a Trustee in bankruptcy—where the conditions of the contract were not fully complied with. In the Belding Hall case, however, the court found that, as a matter of fact, the parties to the contract had by mutual consent previous to the delivery and also previous to the bankruptcy, agreed to certain changes and modifications; and, as the property had been delivered pursuant to the changes and modifications, the title had passed. In the instant case material variations and changes were made by the seller without the consent or even the knowledge of the buyers. The Circuit Court of Appeals, Fifth Circuit, has held that the buyers could elect *after the bankruptcy of the sellers* to accept the material variations and changes in the contract, and that this election would relate back and vest title in the buyers as of date previous to the bankruptcy. This doctrine is as novel as it is unique; it is contrary to general principles and at variance with the doctrine announced by Judge (now Justice) Lurton in the Belding Hall case, supra. To reconcile this conflict on a very important point of bankruptcy law, if for no other reason, this court should review this cause.

4. The court below has misapplied the case of

Idaho, 93 U. S. 575

by holding it applicable to the facts in this case. In that case, the delivery to the carrier was of cotton delivered in compliance with the contract. In this case, the delivery is not in compliance with the contract, but failed in the particulars that the time was different; that the cotton was uninsured, and bills of lading were not delivered. In that case, the delivery was without conditions. In this case the tender was upon various conditions. In that case a bill of lading, issued before the delivery of the goods to the carrier, but followed by an

actual delivery of the goods, was held to relate to and cover the goods. In this case, the court below has held the delivery of the goods to the carrier to relate not to the actual bill of lading, issued for the cotton delivered, but to relate to the forged bills of lading issued long previously and without reference to this particular cotton.

The Idaho case has been a landmark among commercial men, and has been regarded as of large value in the maintenance of commercial honesty. If it be applied to a case like this, it enables a debtor to commit the dishonesty of defrauding his many creditors for the benefit of one favored creditor, and to defeat the purpose of the Bankrupt Law.

Wherefore, your petitioner prays that this Honorable Court will be pleased to grant a writ of certiorari in this case to the Circuit Court of Appeals for the Fifth Circuit to bring up this case to this Honorable Court, for such proceedings therein as to this Honorable Court may seem just.

Wm. D. Lovell,

Trustee in Bankruptcy of Knight, Yancey & Company.

H. Geneva Dupree,

H. A. Blount,

Walker Percy,

Petitioner's Attorneys.

*STATE OF ALABAMA*
*JEFFERSON COUNTY.*

William S. Lovell being duly sworn deposes and says: I have read the foregoing petition, and the averments of the petition are true as therein stated.

Wm. S. Lovell

Subscribed and sworn to before me, this 30 day of November, 1912.

Sadie J. Bates,
Notary Public.

We hereby certify that we have examined the foregoing petition, and in our opinion the petition is well founded, and the case is one in which the prayer of the petitioner should be granted by this court.

H. Seneca Bufour
A. A. Blount,
Walker Percy,
Attorneys for Petitioner.

# In the Supreme Court of the United States.

October Term. No. 593.

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WILLLIAM S. LOVELL, Trustee in Bankruptcy of Knight, Yancey & Company, Plaintiff in Error.

vs.

ISIDORE NEWMAN & SON, Et Al., Defendants in Error.

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IN ERROR TO THE CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

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BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS FOR LACK OF JURISDICTION, OR TO AFFIRM.

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H. GENERES DUFOUR,
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# INDEX


| | Page |
|---|---|
| Reference to brief submitted with petition for certiorari | 3 |
| Questions presented | 4 |
| Statement of the case made by Plaintiff's Petion | 4 |
| Jurisdiction by Consent | 9 |
| The Suit on the Bond involved Federal questions | 15 |
| Motion to Affirm | 24 |


## TABLE OF CASES CITED


| | |
|---|---|
| Acme Harvester Co. v. Beekman Lumber Co., 222 U. S., 300 | 21 |
| Bardes v. First National Bank, 178 U. S., 524 | 11 |
| Bock v. Perkins, 139 U. S., 628 | 22 |
| Bryant v. Swofford, 214 U. S., 279 | 16 |
| Burbank v. Bigelow, 92 U. S., 179 | 14 |
| Bush v. Elliott, 202 U. S., 477 | 11 |
| Byers v. McAuley, 149 U. S., 608 | 14 |
| Coder v. Arts, 213 U. S., 223 | 19 |
| Cohens, v. Virginia, 6 Wheat., 264 | 24 |
| Cramer v. Wilson, 195 U. S., 408 | 20 |
| Dushane v. Bell, 161 U. S., 513 | 20 |
| Eau Claire Nat. Bank v. Jackman, 204 U. S., 522 | 17 |
| Great Southern, etc., Co. v. Jones, 177 U. S., 449 | 15 |
| Knapp v. Milwaukee Trust Co., 216 U. S., 545 | 18, 21 |
| Lovell v. Hentz, 181 Fed. Rep., 555 | 25 |
| Mansfield, etc., Ry. Co. v. Swan, 111 U. S., 379 | 15 |
| Metcalf v. City of Watertown, 128 U. S., 586 | 15 |
| Rector, Trustee, v. City Deposit Bank, 200 U. S., 405 | 19 |
| Security Warehousing Co. v. Hand, 206 U. S., 415 | 19, 21 |
| Spencer v. Duplan Silk Co., 191 U. S., 526 | 12 |
| Stanley v. Schwalby, 162 U. S., 255 | 23 |
| Williams v. Heard, 140 U. S., 529 | 16 |
| York Mfg. Co. v. Cassell, 201 U. S., 344 | 18 |

# In the Supreme Court of the United States.

October Term. No. 593.

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WILLLIAM S. LOVELL, Trustee in Bankruptcy of Knight Yancey & Company, Plaintiff in Error.

vs.

ISIDORE NEWMAN & SON, Et Al., Defendants in Error.

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IN ERROR TO THE CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

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## BRIEF FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS FOR LACK OF JURISDICTION, OR TO AFFIRM.

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This brief is submitted in opposition to the motion to dismiss the writ of error or affirm.

We will not repeat the statement of the case which was fully made in the brief filed by us in connection with the petition for a writ of certiorari (that brief, page 3), nor will we repeat the condensed argument there made in support of the right of the Plaintiff in error to have this cause reviewed, that argument being here elaborated. (That brief, page 16.)

## QUESTIONS PRESENTED.

Our position is that two grounds of Federal jurisdiction were shown in plaintiff's statement of his case in the Circuit Court other than diversity of citizenship. Those two grounds being, first, that the defendants in that suit had consented to be sued in either the Circuit or District Court of the United States for the Eastern District of Louisiana, such consent being efficacious by virtue of Section 23b of the Bankruptcy Act to give jurisdiction to either a Federal Circuit or District Court in a suit brought by a Trustee in Bankruptcy to recover assets of the bankrupt estate where such jurisdiction would not otherwise exist; and second, the suit arose under the laws of the United States in that it was based on a bond given by the defendants, Isidore Newman & Son in a proceeding brought in the District Court of the United States for the Eastern District of Louisiana, in which the jurisdiction of the Court taking the bond had been expressly attacked, so that the validity of the bond was involved, and furthermore the suit on this bond involved a construction of the Bankruptcy Act in its provisions as to what property passes to a Trustee in Bankruptcy.

## STATEMENT OF THE CASE MADE BY PLAINTIFF'S PETITION.

To make clear what was stated in the petition by which this suit was commenced, the petition appearing at pages 1 to 7 of the record, and the exhibits thereto appearing at pages 129 to 150 of the record, its essential averments will be summarized.

The petition sets forth the residence and citizenship of all parties to the suit. It did not state that Federal jurisdiction was invoked on the ground of diversity of citizenship, though its averments were sufficient to support the jurisdiction on that ground. It set forth the fact that the removal from the United States of the cotton in controversy had been enjoined at the suit of the Receivers in Bankruptcy of Knight, Yancey & Company under the proceedings in the United States District Court set forth at pages 129 to 150 of the record; those proceedings became part of the petition by reference, they being attached to the petition as exhibits to it. An inspection of those proceedings shows that the Receivers had charged in their petition for a writ of injunction to prevent the removal of this cotton from the United States that the legal title to the cotton was in them, and that it was about to be carried out of the United States to foreign countries where it would be subjected to the claims of foreign creditors of the bankrupts to the prejudice of the bankrupt estate. To this petition the Master of the steamship filed an exception (page 135), in which he set up that the petitioners were "*without right, power or capacity to institute and prosecute this action, or to stand in judgment therein, and that the Court is without jurisdiction ratione materiae.*" The Master also answered the petition, and by his answer set up the circumstances of the fraud by which the bankrupts had obtained the money of the spinners, and claimed that as a result of the circumstances surrounding those frauds and the subsequent shipment of this cotton, that this cotton became the property of the spinners. By the Master's answer

and the petition of the Receivers the facts constituting the controversy over the cotton were fully developed.

The matter in the District Court coming on for hearing, the Court granted an injunction *pendente lite*, forbidding the removal of the cotton unless the value of it should be deposited in the registry of the Court, or unless a bond should be given conditioned on the surety paying the value of the cotton if in a suit afterwards to be brought in the Circuit or District Court of the United States for the Eastern District of Louisiana by the Receivers in Bankruptcy of Knight, Yancey & Company, or the Trustee in Bankruptcy of Knight, Yancey & Company, it should be adjudged in such suit that said Receivers or said Trustee of the bankrupt estate of Knight, Yancey & Company had the right, title or interest in or to the cotton. The day following the entering of this order the bond on which the suit was brought was given. No further proceedings were had in said injunction proceeding.

The bond on which the suit was brought must be read in connection with those proceedings, to which it refers, to be intelligible.

Defendants had questioned in that proceeding the jurisdiction of the District Court over the subject matter and had questioned the right of the Receivers to institute the proceeding, and had also fully plead the facts on which defendants rely for their defense on the merits, and had set up that under those facts the cotton was not subject to administration in bankruptcy. All this appeared from the pleading by which the suit at bar was commenced.

By the supplemental and amended petition of the Trustee in his suit (record page 12), none of the pleadings or orders in the District Court proceeding were eliminated from the statement of the case. On the contrary those averments were reiterated, the sole effect of the amendment being to aver that the bills of lading for the cotton had not been destroyed, as incorrectly stated in the petition in the District Court, and that they had been delivered to the Trustee. The District Judge sitting in the Circuit Court was mistaken in saying in his opinion (page 16, record) that the District Court pleadings had been eliminated by the amendment. With reference to the statement in the same opinion that counsel for the Trustee disclaimed any intention to claim a voidable preference, commented on by counsel for defendants in error, that disclaimer did not eliminate the Federal questions from the case. That disclaimer has been consistently adhered to throughout subsequent arguments, and as hereafter pointed out the Federal questions raised by the case have no reference to the statutes' provisions relating to voidable preferences.

The Court will observe that by the terms of the bond on which the suit was brought an independent suit was to be brought in either the Federal Circuit or District Court for the Eastern District of Louisiana, in which the nature and extent of the Trustee's title to the cotton was to be determined. There is nothing in that bond or in the terms of the order under which it was given which in any way qualified the nature of the title to the cotton which the Trustee might set up. On the contrary, by the terms of that bond recovery could be had under it if it should be

adjudged that either the Receivers, or the Trustees or the Trustee of Knight, Yancey & Company, or the bankrupt estate of said Knight, Yancey & Company had the right, title or interest to the cotton or any part thereof.

To return to the petition by which this suit was instituted, having set forth the proceedings under which the bond was given, and having set forth the bond itself, and having declared the facts with reference to the adjudication of Knight, Yancey & Company to be bankrupts, and the appointment of the Plaintiff in Error as their Trustee, it averred "Your petitioner further avers that said 1311 bales of cotton were at the time of the bankruptcy proceedings and have ever since been the property of Knight, Yancey & Company, *and that as Trustee in Bankruptcy of said Knight, Yancey & Company, your petitioner aforesaid is the owner of and has the right, title and interest in and to the said* 1311 *bales of cotton.*" In its averment of the Trustee's title to the cotton, the petitioner followed the language of the bond, which was all that good pleading required. The language quoted cannot be restricted, as Defendants in Error contend, to declaring on a title no better than the bankrupts had, but the averment quoted would be supported by proof of any title which, by the terms of the Bankruptcy Act, would give a Trustee in Bankruptcy a right of recovery of property to be administered by him for the benefit of the bankrupts' creditors. Read in connection with the allegations of the petition and the answer in the injunction suit, which set forth the essential facts with reference to the history of the cotton and of the claims of the parties thereto, the

Court was called on to adjudicate whether under the facts and circumstances set forth if the cotton had remained within the jurisdiction of the Court it could have been recovered by the Trustee under the provisions of Section 70 of the Bankruptcy Act, which defines the different circumstances under which a Trustee may recover. Defendants in Error have stoutly contended since the inception of this case (and make this contention the first item of their argument on the motion to affirm, page 39 of their brief) that the title to the cotton had not passed to the Trustee, because the bankrupts could not have recovered the cotton; and the Trustee on the other hand has contended that he could recover the cotton because it was subject to execution by the bankrupts' creditors, placing his case on the terms of the fifth subdivision of Section 70-a of the Bankruptcy Act.

Now in view of these recitals, how can Defendants in Error argue that the consent of the defendants to be sued in the Federal Courts at New Orleans did not appear on the face of plaintiff's petition; and further, that it did not appear that the bond in question was given in a proceeding in a Federal Court, and did not involve questions arising under the laws of the United States?

## JURISDICTION BY CONSENT.

With reference to the contention that the Circuit Court acquired jurisdiction of the controversy by consent, regardless of whether there was any other ground of Federal jurisdiction, it will be observed that there was no requirement in the order

of the District Court, express or otherwise, that a bond be given; the matter could have been left to proceed to a determination in the proceedings in the District Court. The Court gave two alternatives in permitting a dissolution of the injunction; first, the value of the cotton might be deposited; and second, the bond referred to might be given. Defendants in Error base part of their argument in support of their motion on the fact that the bond subsequently given had residents of New Orleans as sureties. The Court did not know whether the bond would be given or not. Nor did it know if a bond were offered it would have residents of Louisiana as sureties, or residents of some other state. Hence, the order was so framed that whoever signed that bond as surety must consent to try the title to the cotton in either the Federal District or Circuit Court at New Orleans. It was clearly the desire of all parties to the litigation that the Trustee's right to recover the cotton should be determined in the Federal Courts. The bond was given at the instance of and for the benefit of the spinners. (Record, page 31.)

The spinners further say that there was no jurisdiction by consent, because diversity of citizenship existed, and being sued on the bond the sureties had no alternative but to appear. The consent to be sued in the Federal Courts, however, arose when the order providing for the bond was framed, and the bond was given pursuant to it. Furthermore, the existence of consent under Section 23-b is just as efficacious to afford an additional ground of Federal jurisdiction to diversity of citizenship as would be a Federal question. When a Federal question exists

a defendant cannot say, for the purpose of defeating a writ of error to the Supreme Court, that he did not come into Court because of a Federal question, but came into Court because of diversity of citizenship.

Defendants in Error further argue that the provisions for jurisdiction by consent contained in Section 23-b relate to jurisdiction in the District and not in the Circuit Court. They make this argument in the face of two explicit holdings of this Court to the contrary.

In Bardes vs. First National Bank, 178 U. S., 524, discussing Section 23-a and b of the Bankruptcy Act, the Court said:

> "But the second clause (23-b) applies both to the District Courts and to the Circuit Courts of the United States as well as to State Courts. This appears not only by the clear words of the title of the Section ('Jurisdiction of United States and State Courts'), but also by the use in this clause of the general words, 'the courts' as contrasted with the specific words 'United States Circuit Courts' in the first and in the third clauses."

In Bush vs. Elliott, 202 U. S., 477, which dealt with the jurisdiction of the Circuit Court, the Court re-affiirmed the above declaration from the Bardes case, saying:

> "Under clause b the jurisdiction of *all* courts is affected, and this clause pertains to suits begun by the trustee, and he is not (prior to the amendment of February 5, 1903), permitted to prosecute suits unless by the consent of the defendant except where the bank-

> rupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted."

In Spencer vs. Duplan Silk Company, 191 U. S., 526, the Court was dealing with the jurisdiction of the Circuit Court when it said:

> "Plaintiff brought his action in the State Court, and its removal on the ground of diverse citizenship placed it in the Circuit Court as if it had been commenced there on that ground of jurisdiction, *and not as if it had been commenced there by consent of defendant under Section* 23 *of the Bankruptcy Act.*"

Since Section 23-b is silent as to what Courts may obtain jurisdiction by consent over cases which they would not otherwise have jurisdiction over, it would be a strained construction to hold that Congress did not have in mind, in conferring jurisdiction by consent on unnamed courts, the Circuit Court, in which plenary actions of the general character dealt with are ordinarily brought. Indeed if it had to be held that this consent provision applied to only one court, the natural construction would be that it referred to the Circuit Court, since there "suits" by individuals to recover property could only under then existing laws be brought.

Defendants in Error suggest that the holding in the Bardes case to the effect that Section 23-b applies to the Circuit Court was erroneous, because in the Bardes case it is stated that this clause applies both to the United States and State Courts. Whether the Court was correct in saying that the clause applied to the State Courts would not affect

its holding that the clause applied to Circuit Courts, because it was certainly competent for Congress to say that the Circuit and District Courts should have juridsiction of a cause by consent.

It is further suggested by Defendants in Error that the jurisdiction of the Circuit Court is entirely defined by clause a of section 23. But the true purpose of clause a is to restrict the jurisdiction of the Circuit Court to plenary suits as distinguished from proceedings in bankruptcy. It was evidently the purpose of Congress by Section 23 to preserve the jurisdiction of the State Courts over controversies arising in bankruptcy, except as such jurisdiction would exist in the Federal Circuit Court under then existing laws, or unless parties desired to try such controversies in the Federal Courts. As said in the Bardes case, "One object in inserting this clause in the Act may well have been to leave such controversies to be treated and determined for the most part in the local courts of the State to the greater economy and convenience of litigants and witnesses." Doubtless this is the true theory of clause b. It makes perfectly clear the meaning of the consent provision of this clause, and that meaning is that if the parties prefer to try their controversy in the Federal Courts and evidence that preference by their consent, the jurisdiction of those courts to try such controversies shall not be ousted for the lack of other jurisdictional grounds.

It is not necessary in order that the Circuit Court should have jurisdiction of a suit brought by a Trustee in Bankruptcy by consent that diversity of citizenship should exist. In this respect there is no distinction between the present act and

the Bankruptcy Act of 1867. Defining the jurisdiction of the Circuit Court under the act of 1867, in which it was provided that Circuit Courts should have concurrent jurisdiction with the District Courts of suits brought by an assignee in bankruptcy against persons claiming an adverse interest to the bankrupt, the Court said in Burbank vs. Bigelow, 92 U. S., 179, "The Court (the Circuit Court) under the Bankruptcy Act has jurisdiction of the cause as between the assignee in bankruptcy and the complainant without reference to the citizenship of the parties."

Frequently, to say the least, controversies arising in bankruptcy would exist between citizens of the same state, and the purpose of Congress was, therefore, to permit suits to be brought by the Trustee in Bankruptcy to settle such controversies in the Federal Circuit or District Court if the defendant should, previously to the bringing of the suit, or after it was brought, consent to be sued there. In the absence of Section 23-b, he could not so consent.

Thus, it was said in Byers vs. McAuley, 149 U. S., 608-618:

> "The jurisdiction of the Federal Courts is a limited one, depending upon either the existence of a Federal question or diverse citizenship of the parties. Where these elements of jurisdiction are wanting, it cannot proceed, *even with the consent of the parties.* There is in the controversies growing out of the settlement of this estate no Federal question; the jurisdiction, therefore, must depend upon diverse citizenship, and can go no further than that diverse citizenship extends. The fact that other

parties may be interested in the question involved is no reason for the Federal Courts taking jurisdiction of the controversy between such parties."

To the same effect are:

Mansfield etc., Ry. Co., vs. Swan, 111 U. S., 379-382;
Great So., Fire Proof Hotel Co. vs. Jones, 177 U. S., 449-453;
Metcalf vs. City of Watertown, 128 U. S., 586.

## THE SUIT ON THE BOND INVOLVED FEDERAL QUESTIONS.

The Federal questions in the case apparent in the petition by which the suit was commenced are:

1. By the terms of Sec. 70-a-5 of the Bankruptcy Act, did the title to this cotton pass to the Trustee in that it was or was not leviable on under judicial process against the bankrupt?

2. Did the District Court have jurisdiction of the controversy in which the bond was taken on which the suit was brought?

3. Did the Receivers in bankruptcy have the power to bring the proceeding in which the bond was taken on which the suit was brought?

It is true that the spinners have seen fit not to urge in argument the contentions to the effect that the District Court did not have jurisdiction of the matter brought before it, and that the Receivers in

Bankruptcy had no power to bring that suit. The question number 3 above was the one referred to in Bryant vs. Swofford Bros., 214 U. S., 279, where the Court said: "There seems to be no reason for a nice consideration of the powers of receivers and trustees." But having raised those questions and having done nothing to indicate that they would be abandoned when the suit in question was brought, the spinners cannot now say that they were not questions; and because the Circuit Court of Appeals has held on various grounds that the cotton was not recoverable by the Trustee, they cannot say that one of the questions in the case is not whether the cotton is not recoverable by virtue of the very terms of the Bankruptcy Act taken in connection with the facts of the case. Of course, if there were no facts there would be no question.

The case necessarily involved the question as to whether or not the cotton, the removal of which had been enjoined by the District Court, passed to the Trustee in Bankruptcy under the terms of Section 70-a-5 of the Bankruptcy Act which provides that there shall pass to the Trustee "property which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him." In Williams vs. Heard, 140 U. S., 529, which was a suit brought by bankrupts against an assignee in bankruptcy to recover moneys which the Supreme Court held were a part of the bankrupt estate, but which the State Court held were not a part of the bankrupt estate, the jurisdiction of the Court was objected to on the ground that the case did not involve a Federal question. The Court thus stated

and disposed of the contention that the case was not reviewable by the Supreme Court as involving a Federal question:

> "The single question on the merits of the case is, whether at the date of their adjudication in bankruptcy, the claim of the defendants in error for war premiums passed to their assignees in bankruptcy, as a part of their estate.
>
> "As preliminary to the discussion of the merits of the case, it is urged by the defendants in error that this is not a Federal question, and that therefore the writ of error should be dismissed. We do not think, however, that this contention can be sustained. Both parties claim the proceeds of the award, the defendants in error asserting that it did not pass to their assignees in bankruptcy under section 5044 of the Revised Statutes, and the plaintiff in error insisting that the claim was a part of their estate at the date of their adjudication in bankruptcy, and did pass to the assignees under that section of the Revised Statutes. The assignee's claim to the award is based on that section of the Statutes; and as the State Court decided against him, this court has jurisdiction under section 709, Revised Statutes, to review that judgment; for the dicision of the state court was against a 'right' or 'title' claimed under a statute of the United States, within the meaning of that section."

In Eau Claire National Bank vs. Jackman, 204 U. S., 522, it appeared that the defendants in error contended, as do the defendants in error in this case, that the case involved nothing but questions of fact. Disposing of this contention, the court said:

"A motion is made to dismiss on the ground that the record presents nothing but questions of fact. It is contended that neither in the pleadings of the bank nor in any way was any right, privilege, or immunity under a Federal statute specifically set up or claimed in the state courts. The only questions presented by the pleadings, it is urged, were, did the bankrupt give the bank a preference, and did the bank accept it with reasonable grounds to believe that a preference was intended? The Supreme Court, however, considered the pleadings to have broader meaning, and answered some of the contentions of the bank by the construction it gave to the bankrupt act. The case, therefore, comes within the ruling in Nutt vs. Knut, 200 U. S., 1520, 348, 26 Sup. Ct. Rep., 216. It was there said: '*A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of Section* 709 (*U. S. Comp. Stat.*, 1901 *p.* 575), *to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary.*"

The italicized statement aptly applies to the reiterated contention of the Spinners that under the facts of this case the Trustee stands in the bankrupt's shoes.

It will be noted, too, that the facts in this case were undisputed and without conflict of any kind.

The Circuit Court of Appeals found it necessary to construe the provisions of the Bankruptcy Act as applied to the instant case as will be observed from the discussion in its opinion of the cases of York Mfg. Co. vs. Cassel, 201 U. S., 344; Knapp vs. Mil-

waukee Trust Company, 216 U. S., 545; and Security Warehousing Co. vs. Hand, 206 U. S., 415.

In Coder, Trustee, vs. Arts, 213 U. S., 223 (238) the Court, in support of its jurisdiction in a proceeding in which a trustee in bankruptcy sought to recover assets of the bankrupt estate, said:

> "Is the case one which might have been taken to this court upon appeal or writ of error from the highest court of the state? We are of opinion that it is. In determining the validity of the lien asserted to secure the claim, a construction of the bankruptcy act is directly involved. A construction of the act is insisted upon by the appellant which would defeat the lien. On the other hand, the construction contended for by the appellee would give the lien validity. In such a case, had the case been in the state court, it might have been brought here for review under Section 709 of the Revised Statutes (U. S. Comp. Stat., 1901, p. 575)."

In Rector, Trustee, vs. City Deposit Bank Co., 200 U. S., 405, a Trustee in Bankruptcy brought a suit to recover assets of the bankrupt estate, and the jurisdiction of the Supreme Court to review the case was questioned. The Court thus stated the contention and its disposition of it:

> "It is contended that this court is without jurisdiction. The argument upon which this proposition is rested is this: First. It is said that whilst, in the petition, the right of recovery was based upon the ground of fraudulent preference, it was not disclosed therein whether the preference relied upon was in violation of the bankrupt law of the United States or of the insolvent laws of the State of Ohio; and therefore

a Federal question was not raised, as it was necessary to specially direct the attention of the state court to such a question if it was intended to rely upon it. Second. But even if the Federal question was referred to in the petition, as the cause of action stated in nowise involved the construction or validity of any provision of the bankrupt act, therefore there is no right to review under Section 709 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 575.

*"Both these contentions might well be disposed of by saying that the action was brought by a trustee appointed under the bankrupt law of the United States, seeking to recover what was asserted to be an asset of the bankrupt estate under that law. This, therefore, presented a Federal question, and the denial of the asserted right was a denial of a right or title specially claimed under a law of the United States.*

The Court reached this conclusion after commenting on Cramer vs. Wilson, 195 U. S., 408, and after considering the import of the excerpt from that case quoted in the brief of the movants.

In Dushane vs. Beall, 161 U. S., 513, the question was whether an assignee in bankruptcy could recover assets claimed to belong to the bankrupt estate, it being contended that he had abandoned the claim by not asserting it, the Court said:

"The question whether the assignee in bankruptcy was entitled to this claim was clearly a Federal question."

Both the Circuit Court and the Circuit Court of Appeals passed on the contentions of the parties as to the proper construction of the act as applied to this case, the Circuit Court of Appeals declaring after a discussion of some of the cases decided by the

Supreme Court which deal with the question of what property passes to the Trustee that "it (the cotton) could not have been lawfully transferred by the bankrupts; nor was it subject to levy and sale under judicial process against them."

In Acme Harvester Co. vs. Beekman Lumber Co., 222 U. S., 300, the Court said, in support of its right to review that case:

> "Moreover, the case involves a construction of the Bankruptcy Act. As the Plaintiff in Error contended that the proper construction of the act would defeat the jurisdiction of the State Court, the adverse ruling gave this Court jurisdiction."

The cases of Knapp vs. Milwaukee Trust Co., 216 U. S., 545, and Security Warehousing Co. vs. Hand, 206 U. S., 415, both involved the construction of the same section of the Bankruptcy Act which is involved in this case, 70-a-5. Both were appeals from the Circuit Court of Appeals. In the Security Warehousing Co. case the jurisdiction of the Supreme Court does not seem to have been questioned while in the Knapp case the Court held that its appellate jurisdiction arose not under those provisions of the Bankrupt Act which give additional appeals, but under the provisions of the Circuit Court of Appeals Act, which is confirmed with reference to such a controversy as the one at bar by Section 24-a of the Bankruptcy Act. The Court said: "The case at bar is not of that class; it is an intervention in a bankruptcy proceeding and the appellate jurisdiction is the same as in like cases under the Court of Appeals act. Bankruptcy Act, Sec. 24-a; Hewit vs. Berlin

Mch. Works, 194 U. S., 296; Coder vs. Arts, 213 U. S., 223."

The controversy defined in the bond on which the suit was brought had its origin in the proceedings in the District Court under which the removal of the cotton was enjoined.

With reference to the grounds of Federal jurisdiction above numbered 2 and 3, the injunction *pendente lite* issued by the District Court enjoining the removal of the cotton was in effect a seizure of it not different in legal effect from seizure under a writ of attachment directed to a marshal.

Speaking of a case involving such a seizure, the court said, in Bock vs. Perkins, 139 U. S., 628:

> "A case, therefore depending upon the inquiry whether a marshal or his deputy has rightfully executed a lawful precept directed to the former from a court of the United States, is one arising under the laws of the United States for, as this court has said, 'cases arising under the laws of the United States are such as grow out of the legislation of Congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted.' Tennessee vs. Davis, 100 U. S., 257, 264 (25: 648, 650); New Orleans, M. & T. R. Co., vs. Mississippi, 102 U. S., 135, 141 (26: 96, 98). If the goods in question, when seized, were the property of Lane, the marshal and his deputies were in the discharge of duties imposed upon them by the laws of the United States; and for any failure in that regard he would be liable to suit by anyone thereby injured. Rev. Stat., Sec. 784. This case was therefore one arising under the laws of the United States, and removable from the state court. Feibelman vs. Packard, 109 U. S.,

421, 423 (27: 984, 985); Bachrack vs. Norton, 132 U. S., 337 (33: 377); Reagan vs. Aiken, present term, 138 U. S., 109 (34: 892); Houser vs. Clayton, 3 Woods, 273; Ellis vs. Norton, 16 Fed. Rep., 4."

It will be observed that in this case questions of state law and of general law were involved in the decision of the case, but there was a Federal question as well. So in the instant case. There were questions of general law and state law involved in the case, but there were the Federal questions which we have referred to likewise involved. This situation is dealt with in Stanley vs. Schwalby, 162 U. S., 255-279, where the court said:

"But, so far as the judgment of the state court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this court, whether that question depends upon the Constitution, laws, or treaties of the United States, or upon the local law, or upon principles of general jurisprudence. For instance, if a marshal of the United States takes personal property upon attachment on *mesne* process issued by a court of the United States, and is sued in an action of trespass in a state court by one claiming title in the property, and sets up his authority under the United States, and judgment is rendered against him in the highest court of the state, he may bring the case by writ of error to this court; and, as his justification depends upon the question *whether the title to the property was in the defendant in attachment*, or in the plaintiff in the action of trespass, this court, upon the writ of error, has the power to decide that question, so far as it is one of law, *even if it depends up*

*local law or upon general principles.* Buck vs. Colbath, 70 U. S., 3 Wall., 334 (18: 257); Etheridge vs. Sperry, 139 U. S., 266 (35: 171); Bock vs. Perkins, 139 U. S., 628 (35: 314). And see McNulta vs. Lochridge, 141 U. S., 327, 331 (35: 796, 800); Dushane vs. Beall, 161 U. S., 513 (ante, 79)."

It is not the plaintiff's contentions alone which are to be looked to in determining whether a Federal question exists.

> "A case in law or equity consists of the right of one party, as well as the other, and may truly be said to arise under the constitution or a law of the United States whenever its correct decision depends on the construction of either. Cohens vs. Virginia, 6 Wheaton, 264."

For further authorities the attention of the Court is directed to pages 23 *et seq.* of our brief submitted with the petition for a writ of certiorari.

We therefore submit that the case is properly in the Supreme Court.

## MOTION TO AFFIRM

The motion of the defendants in error is to dismiss or to affirm. In their motion and brief there is averment and assertion to the effect that the decision of the Circuit Court of Appeals is obviously correct, and that it is manifest that the writ of error was taken for delay only, and that the decision of the questions on which the reversal of the cause depends are so frivolous as not to need further argument. We cannot beleive, however, in view of the history

of this litigation, and the general interest that the novel and intricate questions of law involved have aroused in the courts before which it has come, and among the lawyers who are familiar with it, that the phraseology in the motion and brief of defendants in error alluded to is intended to be otherwise than formal.

The existing judgment being adverse to the Trustee's right of recovery, delay can be of no possible advantage to him. On the contrary, it is to his interest that the controversy be speedily disposed of on its merits. Our contentions are not frivolous, the defendants in error manifesting a similar view by filing in the Supreme Court over a hundred pages of brief, and by having filed three separate briefs in the Circuit Court of Appeals. The case has been characterized by the leading text writer in this country on the law of sales as the most interesting one in the law of sales that has arisen in this country in years. A very able District Judge reached, after careful consideration, the opposite opinion to that of the Circuit Court of Appeals in a case involving identically the same questions. See Lovell vs. Hentz, 181 Federal Reporter, 555. That case is also before the Supreme Court on writ of error.

Recognizing, however, the futility of the assertion of counsel as to the worth of their contentions, we carefully prepared an argument on the merits of this case, which appears in the brief filed by us on the petition for a writ of certiorari. That argument was made as succint as possible, and to it the attention of the court is earnestly and respectfully invited, as being the only way that our contention that the decision of this case was utterly unsound can prop-

erly be set forth. The argument referred to appears on page 45 of the brief filed by us on the application for the writ of certiorari, the summary of that argument appearing at page 25 of the same brief. It would serve no useful purpose to reprint this argument, or to elaborate it at this time. It cannot fail to convince the court that the case is worthy of its review on its merits.

Respectfully submitted,

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